

# THE CONVEYANCER

AND

## PROPERTY LAWYER

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### CONVEYANCER'S NOTEBOOK.

The issue of this number sees the official end of hostilities in Europe and this means that practically six volumes of the *Conveyancer* have been published under the war clouds over the Continent. We can, of course, make no heroic claims of parts coming straight off the press in the height of the blitz. This cannot form one of the activities of a quarterly, but we should like to express our thanks to our subscribers for their patience over lateness in issuing the numbers. The essential difficulty is, of course, the uncertainty of printing. We have also tried to retain as elegant a format as the circumstances of paper control will allow.

Much of what we have published is, of necessity, ephemeral and we hope that with the passing of the emergency it may disappear into the limbo of the obsolete and the forgotten. Nevertheless we have tried, both in precedents and in articles, always to include something of permanent value and interest, and the war volumes will remain an integral part of the series notwithstanding the disappearance of the emergency legislation.

Of course, how soon the emergency legislation and its forms and restrictions will become obsolete we do not attempt to forecast. In one respect and as the law now stands there seems little hope of being relieved of it for many years, namely, in the examination of title. It might be worth while to consider whether the burden of proving titles affected by war legislation might not receive statutory mitigation when repealing statutes or orders are considered. For instance, a purchaser might be entitled to assume that an order for leave to sell had in fact been granted where there was a war-time sale by a mortgagee, but even more he should be entitled to assume that any necessary licence of the Ministry of Agriculture or Board of Trade had been granted.

In the meantime there are symptoms that the close of European hostilities will increase the amount of conveyancing business but not largely augment staffs. Anything that will simplify the deduction and examination of title will be very welcome, but what is chiefly wanted is more trained conveyancers. Those who come back from the forces will take some time to pick up the threads. Refresher

courses are to be run under the auspices of the Law Society. We should welcome any suggestions by subscribers which they think might help those returning (and those welcoming them back) to renew their peacetime pursuits.

Meanwhile the war in the Far East remains with us and so do the restrictions on paper and the shortage of printers. We can only express the hope that in the future we may be able to do better than in the past, and also we thank our subscribers once again for their support and encouragement.

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\* *Conditions in Restraint of Religion*.—We have received the following note from Mr. B. B. Benas, who contributed an article on this topic (vol. 8, p. 6):—

So far as regards the designation of the Jewish religious entity as a whole for the purposes of dispositions *Re Moss's Trusts*, *Moss v. Allen*, [1945] 1 A. E. R. 207, does not take us an inch further than *Clayton v. Ramsden*, [1943] A. C. 320, and *Re Donn*, [1944] Ch. 8, in solving the difficulties of Jewish testators who desire to place a restraint upon the intermarriage of their beneficiaries, nor on the terms of the particular will could any such progress have been possible. Vaisey, J., followed the previous cases so far as regards the phrase "the Jewish faith" in declaring it to be "an expression of complete uncertainty", and in this behalf, with respect, there is nothing one can add here to the contrary submissions made in the note in 59 L. Q. R. 215—217 by the present writer. But in the present case on grounds of sheer accuracy of English the learned Judge could hardly have been expected to have upheld, with all deference to the draftsman, such an utterly impossible phrase as "member of the Jewish faith". The present writer recalls the use thereof by a prominent leader in the Anglo-Jewish community in a speech, the phrase being the subject of severe editorial criticism in an organ of the community, attention being called to its anomalous character, it being rightly asked how can one be a "member" of a "faith". His Lordship observed in the present case (at p. 209) that "in the expression 'a member of the Jewish faith' I find a double or perhaps a multiple uncertainty" which makes the defeasance condition void, inoperative and incapable of taking effect. Vaisey, J., however, helpfully showed how precision could be attained and his constructive *dictum* in relation thereto may prove of considerable assistance to conveyancers. His Lordship observed (*ibid.*) that "there are many associations consisting of members whose identity can be ascertained with absolute or reasonable certainty, such as the House of Commons, a club, an Inn of Court, a college, or as we may gather from the testator's will, a synagogue". The testator in his will gave a legacy to "the Synagogue in Sydney, New South Wales, to which (meaning presumably 'of which') his brother . . . was then a member" (p. 208). Here is a pointer which will not be lost upon the conveyancer. Reference to synagogues in the concrete rather than to Jewish faith (or "Jewish religion" or "Judaism") in the abstract may open out possibilities of clarification which will obviate

the difficulties raised by these now frequent successions of cases. But with such a hopeless phrase as "member of the Jewish faith" no other decision could have been expected. As his Lordship observed (at p. 209), "the general intentions of the testator are not in doubt. The trouble is that he has not . . . framed this condition subsequent or condition of defeasance . . . with that measure of clarity and certainty which is necessary to make it valid". The present writer made reference to some methods of avoiding the above difficulty in an article in the *Conveyancer*, vol. 8 (N.S.) at pp. 12—14 ("Conditions in Restraint of Religion").

BERTRAM B. BENAS.

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*Town and country planning—interim development.*—S. R. & O. 349, 1945, is important to all concerned with land development since it contains the regulations made under the Acts to govern interim development. A copy of the rules should be obtained for study. Clause 3 defines the authority to give permission which will normally be the council of the county borough or county district. Clause 4 sets out the permitted developments without leave, but this clause is modified by subsequent clauses. Apart from special classes, such as building under statutory authority and railway, etc., undertakings, permission is not required to make good war damage so long as it does not increase cubic content nor make material alteration to the exterior of the building. Nor is leave required to alter existing buildings for their maintenance *unless* the alterations affect the exterior or are required in connection with any alteration of the use of the building.

It will be seen that this authorisation is narrow enough, but it can be taken away under clauses 5 and 6. These clauses control either areas or particular cases where some development is contemplated that might be affected by even these limited powers of "development". In such cases the authority can, with the consent of the Minister of Health under clause 4 or the Minister under clause 5, direct that such development shall not be made without permission. These directions are then limited by further provisos which make them less restrictive than would otherwise appear, but the provisions are too detailed for a brief note. In effect, no direction under clause 4 is to be made adversely affecting war-damaged property so as to prevent its restoration where the work is for avoiding danger to health or the deterioration of the building, whereas in case of ordinary buildings the control is to be maintained by limiting the amount to be expended on alterations. There are different principles applying to buildings erected under statute, etc., but practitioners generally will be most concerned with the two classes mentioned.

Where a licence is necessary clause 8 sets out the conditions in which it can be *refused* for war-damaged buildings. Shortly they are: (i) design or external appearance would seriously injure amenity *and* is reasonably capable of modification; or (ii) building would not conform to an *intended* building line; or (iii) building would not conform with an intended scheme for the reservation of

the land or for regulating the use of buildings *and* would have to be removed or altered or use prohibited to conform with the scheme; or (iv) building falls within clause 5 already noted. There is no similar restriction on the right of refusal of permission for other buildings save those of persons having statutory powers or mining undertakers.

Application for permission must be in writing accompanied by plans in *triplicate* identifying the land and particulars illustrated by plans and drawings in *triplicate*. With the present shortage of staffs it does not seem likely that many will have time to apply. It seems highly desirable that the Government should establish a kind of public photostat office for the purpose of supplying copies for the use of Government offices generally. It is high time that a process used with such success in the Probate Registry, for instance, should be more generally available.

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*Town and country planning—compulsory acquisition—valuation.*—S. R. & O. 370, 1945, provides some regulations made under the Town and Country Planning Act, 1945, s. 60 (2), for the purpose of valuation for supplemental compensation (see *ante*, pp. 125—129). They are Treasury Regulations and cannot be commended for their clarity. The provisions of section 58, to which these regulations largely apply, are concerned to make compensation to an occupier whose interest is acquired. They deal with: (1) a supplement where the fee simple owner is also occupier; (ii) acquisition of a tenancy; (iii) partnership only of a building; and (iv) agricultural property. In fact they are really designed to attempt a valuation of the value of the occupation as distinct from the property. So with the fee simple it is the difference between the standard value of the land and buildings with a prohibition against development and the standard value of the land without the buildings but with a prohibition against any development other than the actual development: clause 2. With a tenancy the basis is the difference between the actual rent and the annual value of the property at the standard (1939) values and then capitalised for the duration of the rest of the tenancy “and other circumstances”: clause 3.

Clause 5 is very interesting on general principles. The basis is a sale to a willing purchaser in open market with vacant possession but subject to restrictive covenants, easements, etc., enuring for the benefit of other land, public rights of way, common, etc., for the benefit of the public and any restrictions imposed by statute but otherwise free from any other incumbrances. So, for example, land tax would not be included nor apparently would either tithe rent annuities or rent charges.

A tenant would be expected to have undertaken to pay “usual tenant’s rates and taxes” and to bear cost of the repairs and insurance necessary to maintain the land in a state to command the rent. But the application of the Rent, etc., Acts to any land shall be disregarded. This presumably applies to all cases and would have quite a drastic, if entirely unforeseeable, effect on the values.

This brief summary does not cover the whole of the regulations, but we feel that to do so adequately would require more space than they deserve. Any practitioner who is faced with the problem will undoubtedly have to give them prolonged study. The Interpretation Act, 1889, is made to apply: clause 1 (2); but even such a word as incumbrance is not without difficulty. For example, we have mentioned tithe redemption annuities, but we think that they may not be incumbrances for all purposes of the law of property.

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*Rent control.*—The subject of controlled rents is so important to the practical conveyancer that we make no apology for some reference to the Report on this subject just published (Cmd. 6621, price 1s. net). The Report, somewhat optimistically we are inclined to think, envisages control for ten years after the end of the war and advises that control shall cover all property comprised in the 1939 Act, but not property built after the war, though on this last point there are dissenting reports.

This recommendation for the continuance of control will come as no surprise, and it is accompanied by a welcome recommendation that the whole subject shall be contained in a consolidating statute. It is also accompanied by some observations on the present unequal incidence of the restriction with which is incorporated a recommendation that the recovery of possession shall not operate to cause decontrol. The framers of the Report dislike "standard rent" and wish to have a "registered rent" and a "recoverable rent".

"Registered rent" brings out one of the more drastic recommendations. It is proposed that local authorities shall set up (the cost to be defrayed out of the Exchequer) a register in which the rent of all controlled property shall appear. The rent is to be the actual rent payable so as to avoid research into the past. The procedure is for the landlord to apply and the tenant, if necessary, to object. The register is to be open to the public. The registered rent is then easily available to any future tenants.

While there is much to be said for this suggestion we do feel that the increasing number of registers on which the same property will appear is open to objection on a variety of grounds. Perhaps it is useless to suggest that the expense of enlarging the number of officials should be avoided if possible. It is suggested that the problem of registers should be reconsidered as a whole and especially to limit their number.

The most striking proposal is that of Rent Tribunals for determining what ought to be the "registered rent" which then becomes the "recoverable rent". This proposal arises out of the existing inconsistencies and the necessity for making some concessions to changed costs. These tribunals are to be limited to the problem of rent fixing and not to be concerned with the other disputes such as recovery of possession. Only on questions of law is appeal to lie from the decision of the tribunal which, it is proposed, shall be constituted of a paid full-time chairman and a panel of paid members who

shall receive fees according to their sessions. It is anticipated that two hundred such tribunals would be necessary for England and Wales. It is not anticipated that they would be legal tribunals: they "should be composed of persons of experience in public affairs", but should be entitled to employ properly qualified surveyors, valuers or other experts where necessary. They should not have power to award costs nor should any Court fees be charged.

The Report says: "The Tribunals must be composed of members able to appreciate the views of both owners and tenants, and by their work to inspire confidence in their decisions". Quite where they anticipate that the Minister of Health, who is to be responsible, will find 200 full-time chairmen who can do this for a limited period we do not really see, but it is certainly a way out of the difficulty of securing some form of uniformity. At the same time the procedure necessary to get an adequate presentation of the facts from the tenant's point of view is going manifestly to provide a serious problem. Many of such tenants will be persons of little education or substance.

The other striking recommendation is that furnished dwellings should be subjected to control on the model of the methods applied in Scotland during the war. This again necessitates the employment of a tribunal for fixing rents. The tribunal recommended is that for ordinary cases.

A proposal for increase on account of increased cost of repairs is rejected on principle, but it is suggested that three years after the war a technical committee should investigate the matter. In the meantime the Rent Tribunals in fixing recoverable rents will have regard to these matters. It is also recommended that on a certificate of disrepair of the local authority the tenant should be entitled to deduct 30 per cent. of the registered rent.

With regard to recovery of possession, which in view of the immediate shortage is one of the pressing questions, the Committee made no substantial new recommendations. The matter is to be left to County Court Judges. Apart from the question of determining who is the statutory tenant by reference to the tenant at registration it is proposed that the right shall pass to the widow or dependant but no further in accordance with existing law.

This, of course, by no means even outlines the provisions and information of this interesting report. We have tried to pick out the matters of most importance to conveyancers that they may think them over. In a sense it is a conservative report which will not satisfy anyone fully from a political angle. Nor does it seem to deal with the ultimate problem, namely, whether we wish to make "landlordism" a form of investment and business which is attractive. No doubt the members of the Committee may have felt that such a problem was beyond their powers unless the assumption of decontrol implies an acceptance of the view that ownership of houses should be regarded as a good commercial proposition. It is, of course, doubtful whether the law can do much to affect the question, but by way of restraint it may become almost impossible for landlords commercially to main-

tain their property. In the meantime there is little in the report to encourage any lessening in the importance of "vacant possession" in the sales of house property, and it must never be forgotten that an open contract implies vacant possession.

## CAN PERSONAL REPRESENTATIVES BUY LAND ?

By E. O. WALFORD, LL.D.

I have selected the title "Can Personal Representatives Buy Land?" because it is shorter than the inquiry "Can Personal Representatives or Trustees Buy Land?" I do not know whether the learned Judge who made the decision in *Re Wakeman*, [1945] Ch. 177, regarded the personal representative as "*functus*" in relation to that office or not; but that point does not appear to be material.

### FACTS IN *Re Wakeman*.

Briefly the facts were as follows: A testator appointed a bank executor and trustee of his will and gave his residuary real and personal estate to the bank upon trust for sale and conversion. The bank was required to pay his debts and invest the net proceeds "in or upon any of the investments authorised by law for the investment of trust funds". The only land which the testator owned was a freehold house which the bank sold as personal representative. It is stated in Hood and Challis' *Property Acts* (8th ed.), at p. 500, that "Money arising from land subject to a trust for sale is personalty; but the trustees for sale have the powers of a tenant for life and the trustees of a settlement: L. P. A., 1925, s. 28". I am by no means sure that Uthwatt, J., who decided *Re Wakeman, supra*, would agree with that view, and although his Lordship stated that it would be "out of place" for him to deal in any detail with the contentions of counsel, as I have the misfortune to differ from the ultimate conclusion to which his Lordship came, I must explain why I differ. It is enacted by section 28 of the L. P. A., 1925, that

"Trustees for sale shall, in relation to land . . . and to the proceeds of sale, have all the powers of a tenant for life . . . under the Settled Land Act, 1925. . . ."

In section 205 of the L. P. A., 1925, "trustees for sale" are defined as "the persons (including a personal representative) holding land on trust for sale".

I am satisfied that many lay trustees would conclude that a personal representative holding land on trust for sale was a "trustee for sale" within the meaning of the portion of section 28 of the L. P. A., 1925, which I have set out above, and would further conclude that a power given to such a trustee for sale "in relation to the proceeds of sale" (*i.e.*, to invest them in a specified manner) would be available to such a trustee when he had sold the property which he had held on trust for sale and was therefore no longer a person "holding land on trust for sale". Suppose that we substitute something more simple—say "share vendors" for "trustees for sale" and "shares" for "land". Section 28 would then read as follows:

"Share vendors shall in relation to shares . . . and the proceeds of sale" have the power to purchase shares with those proceeds. Applying the observations of the learned Judge in *Re Wakeman*, his words, *mutatis mutandis*, would run as follows: "There is no reason in the nature of things why share vendors who have sold all shares at any time held by them should remain endowed with powers [*i.e.*, of buying shares] which find their origin and meaning in share holding, and which could, if existing, be used only as respects proceeds of sale [of shares]." "But", says the layman, "they appear to be expressly authorised to buy shares with the proceeds." "No", the learned Judge might retort, "in this case the share vendor has sold all his shares and therefore is no longer a share vendor. You have forgotten the definition in section 205. Substituting 'share vendor' for 'trustee for sale' that section would say that a share vendor means 'a person holding shares or at least one share on trust for sale'. A person cannot hold a share on trust for sale if he has sold all his shares. That won't do at all! Show me a share vendor who still holds but one share and I agree that he can buy another share (or shares) with the proceeds of sale of the share which he has previously sold. I cannot agree that 'share vendors holding shares for sale' can be equated with 'share vendors who have held, but no longer hold, shares for sale'."

#### SOLUTION.

What is the answer? It seems simple enough even if one does not turn trustees for sale into share vendors. It is true that section 205 of the L. P. A., 1925, states that "trustees for sale" means the persons (including a personal representative) holding land on trust for sale". If we apply that definition to section 28 (1) of that Act (*vide supra*) we obtain the following wording: "Persons (including a personal representative) holding land on trust for sale shall, in relation to land . . . and to the proceeds of sale, have all the powers of a tenant for life . . . under the Settled Land Act, 1925". They must, of course, sell land in order to get "proceeds of sale". They sell as trustees for sale holding land and they invest the proceeds pursuant to the provision just quoted in the purchase of other land. The same sub-section (section 28 (1)) states that land acquired is to be conveyed to them on trust for sale. *Re Wakeman* seems to say that if Blackacre and Whiteacre are sold and only Greenacre kept, Blackacre and Whiteacre can be replaced by other land, but that if the three properties are sold not a penny of the proceeds can be invested in the purchase of land. No such difficulty as is suggested by Uthwatt, J., arises, so far as I can see. In view of the importance of the point I make no apology for the space which I have occupied in discussing the operation of section 28 of the Act. Moreover, as I have ventured to disagree with the decision I will take this opportunity of referring to some other statutory provisions as follows:—

#### STATUTORY PROVISIONS.

(1) *Administration of Estates Act, 1925, s. 39.*

The above mentioned section provides that the "personal representatives" of the deceased (which includes executors, section 55 (1)

(xi) (a) shall during the subsistence of any life interest (b), or until the period of distribution arrives, have (*inter alia*) all the powers and discretions conferred on trustees holding land upon an effectual trust for sale (sub-section (1), para. (ii)) and *all the powers conferred by statute on trustees for sale* (sub-section (1), para. (iii)) (c). So far as it goes, that section appears to support the suggestion that the decision in *Re Wakeman* was wrong if anything turned upon the point that the bank was acting as a personal representative. I have not lost sight of the fact that the bank, in the first place, invested the proceeds of sale in "securities" which presumably were not land, but it is clear from the report that such securities were "readily distinguishable from those representing the testator's personal estate".

(2) *Law of Property Act, 1925, s. 32.*

By the above mentioned section, where a settlement of personal property or of land held upon trust for sale contains a power to invest money in the purchase of land, then (subject to any provision in the settlement) such land is to be held by the trustees on trust for sale.

I do not think that the inference is that if a settlement of land upon trust for sale does not contain power to buy land no such power exists. The section supplements the settlement where it contains no provision that land purchased by such trustees shall be held on trust for sale, and covers cases in which the conveyancer has not complied with the direction in section 28 (1) that land acquired under that sub-section "shall be conveyed to the trustees on trust for sale".

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COMMORIENTES.

By E. H. BODKIN, Barrister-at-Law.

Though the recent decision of the Court of Appeal in *Re Grosvenor, Peacey v. Grosvenor*, [1944] Ch. 138, is undoubtedly inconvenient, it is becoming increasingly clear from subsequent cases that it is to be regarded as turning upon special circumstances.

Morton, J., in *Re Mercer, Tanner v. Bulmer*, [1944] 1 A. E. R. 759, expressed the view that the statutory presumption as to survivorship contained in section 184 of the Law of Property Act, 1925, would apply in the great majority of cases. Further, as a matter of law, there is nothing revolutionary in the view of the section taken by the Court.

Bennett, J., in *Re Lindop, Barber v. Reynolds*, [1942] Ch. 377,

(a) I do not think that there is anything in *Re Trollope's Will Trusts*, [1927] 1 Ch. 596, which affects the question of the application of s. 39 where the executors are still operating in the capacity of personal representatives.

(b) It would appear that there was a subsisting life interest in the *Wakeman Case*.

(c) I doubt whether the *dicta* in *Re Trollope*, *supra*, suggesting that the reference to a life interest, etc., and the period of distribution is explained by the provisions of s. 33 concerning cases of intestacy justify the view that the powers mentioned in s. 39 are exercisable only in relation to property not disposed of by will. Admittedly, those powers do not apply if the personal representatives have ceased to be personal representatives and have become trustees. It does not follow that trustees for sale who have sold the land which they held upon trust for sale cannot invest the proceeds in the purchase of land.

envisaged the possibility of the statutory presumption being rebutted by direct evidence of simultaneous death, and his decision was founded, in part at any rate, on the unsatisfactory nature of the doctor's testimony.

Prior to 1925 there was no presumption in English law in regard to survivorship of persons perishing by the same calamity. In the earlier cases some authority may be found for the view that the presumption of law in the civil law applied. In the absence of evidence the Ecclesiastical Courts often presumed that the deaths were simultaneous. But in *Wing v. Angrave*, 8 H. L. C. 183, the House of Lords definitely rejected any presumption of law, the question being, as Lord Campbell pointed out, from first to last a pure question of fact, the onus of proof lying on the party asserting the survival.

Under section 184 of the Law of Property Act, 1925, where two or more persons have died since the Act in circumstances rendering it uncertain which of them survived the other or others, such deaths are (subject to any order of the Court) for all purposes affecting the title to property to be presumed to have occurred in order of seniority, and accordingly the younger is to be deemed to have survived the elder.

There is a somewhat similar provision in the Code Napoléon which provides that "la présomption de survie est déterminée par les circonstances du fait, et à leur défaut, par la force de l'âge ou de sexe". Under this provision, as Lord Campbell observes in the judgment above quoted, until the Judge has come to the conclusion that the circumstances proved establish a perfect equipoise, he cannot resort to the presumption of law, which, in the absence of satisfactory evidence, he is bound to respect.

Under section 184 the evidence (if any) of the actual happening is to be considered, and according to *Re Grosvenor*, *supra*, it is to be determined whether the inference can be drawn (1) that the person through whom the plaintiff claims was the survivor, (2) that it is uncertain who was the survivor, or (3) that the deaths were simultaneous; the onus being on the person claiming the property to prove affirmatively that either (1) or (2) was the fact.

It will be seen that the fact of simultaneous death now assumes great importance. Under the old law it did not arise as a separate issue; it was sufficient for the next-of-kin to set up as a defence that survivorship was not proved. The question was, however, adverted to by Lord Cranworth in *Wing v. Angrave*, *sub nom. Underwood v. Wing* (4 De G. M. & G., at p. 660) and he then propounded the doctrine of the "indivisibility of time" which has led to so much diversity of judicial opinion. He expressed the view that "it could not be assumed to be proved or probable or possible that two human beings should cease to breathe at the same moment, for that is hardly within the range of imagination, and to "adjudicate on such a principle would, I think, be proceeding upon false data". This was, however, the merest *dictum* in explanation of the statement of Lord Romilly, M.R., when the case was before him, that he must assume that the husband and wife had died simultaneously. When the same case came before the House of Lords, Lord Campbell somewhat half-heartedly approved of the idea, observing that he would not say it was impossible for two persons to die at the same point of time, although time, like matter,

was supposed to be infinitely divisible. The theory was again cited with approval and acted upon by Sargant, J., in *Re Fisher, Robinson v. Eardley* (1915), 84 L. J. Ch. 342. (This case was not referred to in *Re Grosvenor, supra.*) His Lordship considered that the death of one person in the lifetime of another was a scientific certainty, and on this assumption held that words referring to the death of one devisee before the other as a contingent event must, in order to give them a sensible meaning, be taken to refer to death in the lifetime of the tenant for life. In *Howard v. Howard* (21 Beav. 550) Lord Romilly on similar reasoning held that the words in the case before him referred to death in the testator's lifetime.

The philosophical conception may in view of the theory of relativity (for all the present writer knows) be as unscientific as the infinite divisibility of matter. However that may be, it raises a still more difficult physiological question. The issue is not whether the two persons were killed at the same moment, but whether they died at the same moment, a very different matter. Bennett, J., relied much on this distinction in *Re Lindop, supra.* His Lordship observed that two birds might be killed by being struck at exactly the same moment by different pellets from the same cartridge; but there might well be a considerable period of time between their deaths. Time being infinitely divisible the fact of two persons dying at exactly the same moment of time was so highly improbable that the evidence relied on to prove it must be looked upon closely and critically.

A similar question was dealt with at length in the medical evidence in *Wing v. Angrave, supra.* There expert evidence was given that death in the sense of the cesser of all the vital functions might not result from asphyxia for as much as two minutes; and that, though asphyxia might result at the same time whether the person were weak or strong, the interval between asphyxia and death would depend on the physical strength of that person, varying with age and sex and a healthy or unhealthy state of body. The distinction between being killed, and dying, was not considered and on the facts could not have arisen in *Re Grosvenor, supra.* There the deceased were killed while sheltering in a small basement sand-bagged room by a bomb, which on the evidence was held to have penetrated right through the house. The bodies were so mutilated as to be unrecognisable, and were only identified by the effects found on them, some being actually dismembered.

Luxmoore, L.J., thought there was no distinction for practical purposes between the evidence and that in *Re Lindop, supra.* But from the report of the latter case in 2 A. E. R. 46, where the evidence is given at length, it appears that there were in fact two bombs, and it was not proved where they exploded.

The decision in *Re Grosvenor, supra*, therefore leaves the legal implications arising from the distinction between death and the cesser of the vital functions unaffected. Lord Greene, M.R., gave short shrift to the doctrine of the indivisibility of time. "The statement", said his Lordship, "that time is infinitely divisible was said to be a scientific fact: I would prefer to call it a metaphysical conception. No doubt when a bevy of angels is performing saltatory exercises on the point of a needle, it is always possible to find room for one more,

but propositions of this character appear to me ill suited for adoption by the law of this country, which proceeds on principles of practical common sense”.

His Lordship then referred to the *dicta* in *Wing v. Angrave, supra*, quoted above, and pointed out that in that case, where the deceased were swept overboard by the same wave, the possibility that they died simultaneously could not for obvious reasons be entertained. “If Lord Cranworth”, he proceeded, “had foreseen the march of civilisation and had been able to visualise the possibility of a high explosive bomb bursting in a basement and blowing a number of persons to pieces, I cannot help thinking that he would have used different language.” In 1855 the sort of calamity in which two persons might lose their lives, such as fire or shipwreck, was in its nature such as to leave a reasonable probability that one survived the other, or to exclude the probability that they died simultaneously. To speak of the infinite divisibility of time in relation to a high explosive bomb bursting in a basement shelter appeared to ignore the realities of the case. As regards the evidence, the only other possibility suggested was that one of the deceased might have been struck and killed by the bomb a fraction of a second before it exploded. But if two persons were guillotined one might die of fright before the blade descended.

Luxmoore, L.J., in a dissenting judgment, though commenting on the great difficulty of proving simultaneous death, and observing that the difficulty of proof did not lessen as the number of persons increased, did not consider it overwhelming. The evidence was not, however, sufficient to prove it. It might well be (and he had seen reports in the Press to that effect) that in cases where small houses and shelters had been demolished by direct hits, some of the persons sheltering had been found alive among the debris. The vagaries of bomb-burst and bomb-blast were notorious. The fact that one person was blown to pieces while another had one or more of his limbs torn off would not justify a finding of death at the same moment. He would require the assistance and experience of a well-qualified expert on the effects of bomb-burst and bomb-blast and their result in actual cases before coming to such a conclusion. The onus of proof was still as heavy as it was in Lord Cranworth’s time.

Goddard, L.J., also thought that there was no law that simultaneous death was incapable of proof, and that the possibility had in fact been envisaged by the Courts. Quoting the well-known passage in the opinion of Willes, J., in *Cooper v. Slade* (6 H. L. C., at p. 772) that “in civil cases the preponderance of probability may constitute sufficient ground for a verdict”, his Lordship expressed the opinion that in the present case it was a matter of certainty. The probabilities were so overwhelming that to feel doubt was really to speculate on improbable possibilities.

Lord Greene, M.R., admitted, however, that inference of simultaneous death must not be drawn in every case where two persons are killed by the same bomb. Each case must depend on its facts. For example, if the deceased when killed by blast were some distance away from each other, the Court might well decline to draw the inference, particularly if it had before it evidence of the capricious effects of

blast. Again, if the deaths were caused by shrapnel, the possibility might well be too remote to take into consideration.

The older cases were concerned mostly with events where the possibility of simultaneous death was so remote as to be left out of account, *e.g.*, shipwreck, massacre, or death by natural causes (cf. *Ommaney v. Stillwell*, 23 Beav. 328), where, however, the death of one person occurred at a known date, and that of the other, who was a member of Sir John Franklin's expedition, at an uncertain date. In *Re Good*, 24 T. L. R. 493, a case of two suicides, whose bodies were found floating together, but there was no evidence as to the occurrence, the probability was perhaps somewhat greater.

In *Re Howard, Howard v. Treasury Solicitor*, [1944] P. 39, one of the exceptions envisaged by Lord Greene, M.R., actually occurred, the distinction between the two classes being very clearly illustrated. There the parents were sleeping together in one room and the son in another on a different floor. The house was demolished by a land mine; the bodies of the father and mother were dismembered, but that of the son was found in a different place and not mutilated. It was held by Henn Collins, J., that the son must be presumed under section 184 to have survived his parents, but that the parents must be considered to have died simultaneously with each other.

*Re Mercer, Tanner v. Bulmer*, [1944] 1 A. E. R. 759, is a further example of this exception. Two bombs fell outside the house, and it was not proved that the deceased were in the same room at the time. A further complication was introduced by the fact that the bodies were burnt, either by escaping gas or incendiaries, and there was a possibility that this was the cause of death. The case is also interesting as showing that a similar difficulty as to survival may arise in another sense in regard to chattels. Although under section 184 the wife was presumed to have survived the husband, her estate was not entitled under his intestacy to the compensation payable under his policy under the private chattels scheme, since her administrators could not prove that the chattels had existed after his death. The chattels themselves would not pass in such circumstances to the wife as personal chattels, under the Administration of Estates Act, 1925, nor would the policy moneys pass as representing them. The principle is the same as that which governs a bequest of chattels, which is adeemed by their destruction, and does not entitle the legatee to the benefit of a policy covering them (see *Durrant v. Friend*, 5 De G. & S. 543).

Positive proof of survival, which was of course the only way prior to 1926 whereby a person claiming through the deceased could prove his title, raises some interesting questions. The simplest case is where direct evidence of survival is adduced. An example of this is to be found in *Wing v. Angrave, supra*, where the daughter was actually seen struggling in the waves after the others had sunk. As Lord Greene, M.R., observed in *Re Grosvenor, supra*, a Court would not in such circumstances take into account the possibility that the swimmer was seized with cramp and sank, and that the others rose to the surface and survived her. The Court would draw the more probable inference; it was a question of fact to be determined in accordance with the usual method of dealing with such questions. Another example is to be found in *Broughton v. Randall*, Cro. Eliz. 503, where survivor-

ship was determined by the movement of the legs of two felons hanged together.

The inference of survivorship cannot, however, be drawn from uncertain data, such as the position in which a person is sitting in a car which crashes into a level crossing, and which might be thought to result in their striking the gate before the others (see *Re Nightingale, Hargreaves v. Shuttleworth* (1917), 71 Sol. Jo. 542).

Lord Cranworth pointed out in *Wing v. Angrave, supra*, that where persons are washed overboard and disappear together, it is only by mere conjecture that survival can be presumed from age, sex, constitution or strength of mind. But cases can be imagined where these factors may be very material. In *Sillick v. Booth*, 1 Y. & C. C. C. 117, it was laid down that evidence of health, strength, age or other circumstances may be given tending to the judicial presumption of survival; and in that case the elder and stronger of two brothers was presumed to have survived when their ship was lost in unknown circumstances.

In convulsions of nature, such as volcanic eruptions, the ability to escape, whether by running, climbing or swimming, may lead to an almost irresistible presumption that the stronger and more active survived; and even in death by drowning, where the sea is calm, a strong swimmer would almost certainly outlive a person who could not swim at all.

And the mental aspect is not to be ignored. In *Taylor v. Diplock*, 2 Phil. Ecc. 621, evidence of the probable physical effects of terror on a person in the state of health of the deceased was admitted. Medical evidence may also be given as to the time likely to elapse between the injury causing death and the cessation of the vital functions. It was apparently from this point of view that Bennett, J., considered the absence of a post mortem relevant in *Re Lindop, supra*.

Medical evidence can similarly be received to prove simultaneous death, which is to be deduced from direct proof or inference of fact in the same way as survival.

It is perhaps unfortunate that the Court of Appeal did not see its way to hold that the statutory presumption applied to the case of simultaneous death. To have done so would have simplified the task of executors and trustees. All cases in which there is likely to be doubt and in which subsequent evidence to upset the *prima facie* conclusion is likely to turn up would thus have been covered by the section. It was apparently impossible to construe uncertainty as to which survived as including the case of simultaneous death, where it is certain that neither did so; but the same result might have been arrived at by holding that simultaneous death was impossible in law. It must be borne in mind that there is no protection to the executors whether they distribute the estate on the assumption that the statutory presumption arises, or that one of the deceased survived the other, or that the deaths were simultaneous. In fact the only case when they can safely administer without seeking the protection of an order of the Court is when there is clear evidence of survival.

There are some other questions arising on the section. Its operation is limited to purposes affecting the title to property. This phrase was held by the Court of Appeal in *Re Grosvenor, supra*, not to be confined to questions of title strictly so called, e.g., survivorship

as between joint tenants, but to cover claims by or through a legatee or devisee to the legacy or devised property. It would not extend in general to cases of contracts, *e.g.*, liability of joint promisors.

The section is not confined to commorientes properly so called; it would apply to the death of a person who has gone abroad and vanished, and that of another person who has died at a known date in England.

The words "subject to any order of the Court" have given rise to much difference of judicial opinion and have not as yet been authoritatively interpreted. All the Judges before whom *Re Grosvenor*, *supra*, came, agreed with Bennett, J., in *Re Lindop*, *supra*, that they did not give the Court a discretion to depart from the presumption in cases where the section says it is to arise. Bennett, J., interpreted the phrase as enabling the Court, although the circumstances made it uncertain which was the survivor, to hear evidence on the question, and to act on it if sufficient to displace the presumption, *i.e.*, that it merely meant that the presumption was rebuttable and was in fact tautological.

Cohen, J., and Luxmoore, L.J., in *Re Grosvenor*, *supra*, agreed with him. Lord Greene, M.R., on the other hand thought this construction grammatically impossible, and that the reference was to further orders of the Court on fresh evidence becoming available.

The result of proving simultaneous death in the common case of husband and wife who have each made a will giving their property absolutely to the other, will be that the estate of each will devolve upon their statutory next-of-kin. This is so whether or not the gift is expressly made contingent on the other spouse surviving. Similarly, a legacy to A or if he predeceases the testator to B, will fail if they die simultaneously. The representatives of A could not prove that A survived, nor those of B that A predeceased, the testator. If each spouse leaves his or her whole estate to the other, and if the other does not survive to a third person, that person will generally, of course, obtain a good title to both estates under the will of the survivor. If they are proved to have died simultaneously, he will, it seems, take the property of each under their respective wills, at any rate if there is an intention that they should take on failure by any means of the prior gift (see *Wing v. Angrave*, *supra*, at pp. 204; 210). The section has removed the difficulty which arose in *Wing v. Angrave*, *supra*, where the appellant took the property of the husband and wife in different capacities, and it was held that he could not get over his inability to prove the survival of either by uniting his claims and alleging that he must be entitled *quacunqve via*.

The difficulties of proof are avoided by the common form of will, giving the property to the other spouse if surviving for a month. But even if this be adopted, it will not avoid questions as to devolution of the legal estate in property of which the spouses are joint tenants, unless they appoint the same persons as executors; and even if they do, it does not appear clear how the estate duty is to be dealt with.

Section 184 does not generally apply to the devolution of the personal property of persons domiciled abroad. Though the method of proving any fact bearing on survivorship is determined by the *lex fori*, the effect of the facts so proved for the purposes of administration

depends on the substantive law of the domicile. Thus where, as in the German Code, there is a presumption if it is impossible to prove survival that the deceased died simultaneously, and this is part of the substantive law and not of the law of evidence, the devolution of the property will depend on the foreign law : *Re Cohn*, [1945] 1 Ch. 5.

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### THE END OF A TRUST FOR SALE OF LAND.

One of the most important practical decisions for conveyancers is to be found in *Re Wakeman*, [1945] Ch. 177. The short point of the decision was simplicity itself. A testator had created a trust for sale of his residuary property which included a freehold house. The trustees sold the house and subsequently they wished to invest part of the trust fund in purchasing a dwelling-house for the tenant for life on the ground that as trustees for sale they had the power to invest in realty conferred upon them by the Settled Land Act, 1925, by virtue of section 28 (1) of the Law of Property Act, 1925. "Trustees for sale" for the purposes of the Law of Property Act are defined (section 205 (1) (xxix)) as "the persons (including personal representatives) holding land on trust for sale". Having regard to this straightforward definition Uthwatt, J., held that so soon as the trustees had sold all the land they ceased to be persons within the definition and consequently they had no power to invest in land by virtue of the Settled Land Act. The learned Judge indicated that it might be a proper case for an application under section 57 of the Trustee Act, 1925, for the Court to authorise powers not conferred by the Acts or by the settlement.

One point which the learned Judge did not have to consider on the facts of the case but which must immediately occur to the mind is whether in view of his decision trustees for sale ever had power to invest the proceeds of sale in land. The contention was put forward that the decision would result in the absurdity that the retention of the smallest quantity of land would entitle the trustees to retain the powers of investment under the Settled Land Act, but is this really so?

It should be noticed initially that section 28 (1) begins : "Trustees for sale shall, in relation to land or manorial incidents and to the proceeds of sale, have all the powers . . ." Quite clearly the proceeds of sale of land held on trust for sale may be applied in some circumstances under the Settled Land Act. If we read in the definition and omit some phrases the opening words are as follows : "Trustees for sale holding land on trust for sale shall, in relation to . . . the proceeds of sale, have all the powers . . ." Now this does not mean the proceeds of sale of *the* land sold because it seems inconsistent with the decision, yet, if the proceeds of sale are to be reinvested in land, then it must constitute the proceeds of sale of land sold. Therefore, it is respectfully submitted, as the proceeds of sale must not be the proceeds of sale of land sold to be within the section it seems that the powers of investment in land do not exist. Of course the proceeds of sale may be used for other powers, *e.g.*, to make improvements in

respect of other land within the trust and this, presumably, is the reason for the reference to proceeds of sale being incorporated. The objection to this interpretation is the sentence "all land acquired under this subsection shall be conveyed to the trustees on trust for sale", but as the powers under the Settled Land Act include, for example, a power to exchange it does not present any insuperable difficulty.

This rather tongue-twisting problem is not, however, the real essence of the importance of the decision. It goes deeper than that. First, let us consider what happens when all the land is sold so far as the trust for sale is concerned. The assumption behind the decision seems to be that the trust has come to an end and that a new trust has arisen concerning the proceeds of sale. Basically this seems to be unsound, but it follows, perhaps, naturally upon the practice of conveying the land to the trustees by one deed and declaring the trusts by another, a practice dictated by the conveniences of title. Nevertheless it is submitted that it does not coincide with the declared trusts.

The conveyance to the trustees normally declares that the land until sale and the proceeds of sale after sale will be *held* upon the trusts declared by an instrument of even date, etc. This practice is certainly more than a century old. It will be observed, therefore, that the trustees of the land remain the trustees of the proceeds of sale. So if by chance A and B were trustees of Blackacre upon trust for sale but C and D became trustees of any other property comprised in the actual deed of settlement declaring, *inter alia*, the trusts of the proceeds of sale, then in fact A and B would hold on a separate trust from C and D though the beneficial interests would be dictated by reference to the trust instrument. This example is not so absurd as it appears, because an appointment of new trustees of a trust instrument might overlook appointing trustees to the deed of conveyance (for the appropriate method see 1 K. & E. (14th ed.), pp. 156—158). Yet if, as must be the case here, the trust is a separate trust from that governing the rest of the property contained in the settlement, how, then, can the trust for sale be said to come to an end merely by sale?

It is submitted that the problem has been produced to some extent by the attitude towards the position of the trustees for sale, which is to treat them not as trustees to *hold* the proceeds of sale but to *pay* the proceeds to someone else, so, of course, putting an end to the trust. This *may* be due to what *appears* to be the origin of the trust for sale before it became little better than a legal fiction. The only kinds of trust for sale that the writer has been able to find before the middle of the eighteenth century, when the doctrine of conversion was laid down as applying to such trusts, were either trusts under a will to sell to pay debts, etc., and to *divide* the surplus, or else trusts in a deed executed for the benefit of creditors to sell and to pay creditors and *to pay* the residue to the settlor. Hence the trust for sale seems to have started life as a trust to pay rather than as a trust to hold and it may well be that the tradition has survived. Hence it has been natural, perhaps, to regard the trustees of the land as under a duty to pay to the trustees of the proceeds of sale, though of course normally they are the same persons and by the Trustee Act, 1925, s. 35 (1) are required to be the same persons. It is submitted, however,

that though they may be the same persons the decision in *Re Wakeman* (*supra*) involves the acceptance of the proposition that, at least where there are two deeds, there are two trust funds and, if this is correct, this may involve a number of subsidiary points as, for example, how far the funds of one can be applied to the property contained in the other trust.

Perhaps there is nothing very new in this notion of separate funds of personalty. In *Re Jauncey*, [1926] Ch. 471, Russell, J., held that a mortgage of a reversionary interest charged upon a mixed fund composed partly of proceeds of sale under a trust for sale of realty and partly of pure personalty was barred under the then statute of limitations as to the proceeds of sale but not as to the pure personalty (a). Here the distinction made (based upon *Re Fox*, [1913] 2 Ch. 75, and *Re Witham*, [1922] 2 Ch. 714) operated to arrive at a conclusion in principle opposite to that of *Re Wakeman* (*supra*) since it treated the proceeds of sale as if the trust for sale of the land still subsisted. The principle was stated as early as 1903 by Wright, J., in *Kirkland v. Peatfield*, [1903] 1 K. B. 756 (and subsequently approved in other cases): "I have no doubt whatever this fund ought, for the purpose of the mortgage, to be regarded as land. I should have thought so even if the land had already been sold. Well, then, if the fund ought to be regarded as land, why does not section 8 apply? It is an action brought to recover 'a sum of money charged upon or payable out of land'". In parenthesis we might say that a trust for sale of land must, for the purposes of the Law of Property Act, 1925, include "an easement, right, privilege or benefit in over or derived from land but not an undivided share in land": section 205 (1) (ix). If proceeds of sale are not a benefit derived from land we should be interested to learn how they differ from such a benefit. It should be added with reference to *Re Jauncey* (*supra*) that it was the first of the cases under the Real Property Limitation Act in which the whole of the land had been sold, though in *Re Witham* (*supra*) part of it had been sold.

Apart from the obvious problem of appointment of trustees, where there is a possibility of the funds of the original settlement being vested in separate trustees, the conclusion that the trust for sale changes character on sale of all the land may result in a variety of different effects. It is submitted again that the only possible effect of *Re Wakeman* (*supra*) is to determine the trust for sale of land for all purposes. The decision is not confined to the application of section 28 because it depends upon a wider principle altogether. The question before the Court was whether or not there continued to be a trust for sale of land, and the learned Judge held that there was not. Let it be then noted that *presumably* (but this is a matter of construction in each case) there is not, so far as the proceeds of sale are concerned, a trust for sale of the proceeds for those proceeds are held upon the trusts of the proceeds of sale contained in the trust instrument and not upon any trust for sale of personalty contained in the trust instrument. How far this may affect any problems in distribution of capital and income or in investment may again be affected by the terms of the trust instrument. The power to invest and vary investments, however,

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(a) The decision has virtually been reversed by the Limitation Act, 1939, s. 18 (1).

has now been held to be very wide: *Re Pratt's Will Trusts*, [1943] Ch. 326, and for some of the powers and duties of trustees of sale (not necessarily concerned with trustees for sale of land): see *Lewin on Trusts*, 14th ed., p. 607. We have here assumed, of course, that the usual form of trust for sale has been adopted, namely, that the trustees shall hold the proceeds of the trust for sale upon the trusts declared of the proceeds of sale.

## SOME REFLECTIONS ON CHARITABLE TRUSTS AS PUBLIC TRUSTS.

By H. M. BROUGHTON, of Lincoln's Inn, Barrister-at-Law.

In the oft-quoted case of *Income Tax Commissioners v. Pemsel*, [1891] A. C. 531, Lord Macnaghten is reported to have said (p. 583): " 'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding heads." The first three divisions may have their own difficulties arising from the particular language of the settlor or testator, but they can hardly be as great as the difficulty of deciding if a case comes within the fourth category. In *Re Macduff* [1896] 2 Ch. 451, at p. 466, Lord Lindley stated that Lord Macnaghten had taken his classification of charities from the argument of Sir Samuel Romilly in *Morice v. Bishop of Durham* (10 Ves. 522) where he spoke of the fourth division as being the most difficult. There are many objects of public general utility which are not charities in the eyes of the law. To be a charity the trust must affect some section of the public. In *Re Compton*, [1945] 1 Ch. 123, a testator left money under a trust for ever for the education of C., P., and M. children, the C. children being the descendants of H. C. Compton, the P. children of Weyland Powell and the M. children of William Earl of Sandwich. At the time of the summons there were living ten C. children, six P. children, and twelve M. children. The Court of Appeal decided that this was not a valid charitable trust, as the persons to be benefited were defined through a personal relationship and lacked the quality of a public trust. If we may respectfully express our agreement we would do so, by inquiring how it could be a public trust when it was limited to the descendants of three families. It was held to be merely a family trust and not one for the benefit of a section of the public. In a sense, the children were a section of the public, but they were to be benefited as members of particular families. It is the same in trusts for the advancement of religion. As Vice-Chancellor Wickens said in *Cocks v. Manners* (L. R. 12 Eq. 574, at p. 585): "It is said, in some of the cases, that religious purposes are charitable, but that can only be true as to religious services tending directly or indirectly towards the instruction or the edification of the public; an annuity to an individual, so long as he spent his time in retirement and constant devotion, would not be charitable, nor would a gift to ten persons, so

long as they lived together in retirement and performed acts of devotion, be charitable". To put it shortly, the beneficiaries must benefit as a section of the public, and our readers should note up the disagreement of the Court of Appeal with the statement in *Tudor on Charities* (4th ed., p. 51; 5th ed., pp. 30, 31) that bequests for the education of the donor's descendants and kinsmen at a college of one of the universities are charitable (*Re Compton, supra*).

In *Re Christchurch Inclosure Act* (38 Ch. D. 520) the Commissioners under the Inclosure Act by their award allotted to the lord of the manor in trust for the occupiers for the time being of certain cottages 425 acres of waste for a turf common for the use of those occupiers. A railway company took part of the turf common for the purpose of their undertaking, and the purchase money was paid into Court. The Court of Appeal held that the lord of the manor was entitled to such part of the fund as represented the value of the soil in the land taken by the company, and that the remainder of the fund was to be held as a charitable trust for the benefit of the occupiers for the time being of the cottages. The fact that the trust was created by statute prevented its being invalid as a perpetuity or on any other ground, but the Court held that if it could be regarded as a charitable trust it ought to be so regarded. Lord Justice Lindley, in delivering the judgment of the Court, admitted that if it had not been for the decision in *Goodman v. Mayor of Saltash* they would have felt great difficulty in holding the trust to be a charitable one. There were certain provisions in the Inclosure Act which showed that it was the intention to protect poor people and so to support the view that there was a charitable trust. Very often the smallness of the gift may show that the settlor or testator had in view the relief of poverty, and that of course is an argument in favour of a charitable trust.

In the *Pemsel Case (supra)* Lord Macnaghten said: "The trusts last referred to are not the less charitable in the eye of the law, because incidentally they benefit the rich as well as the poor, as indeed every charity that deserves the name must do, either directly or indirectly". A testator or settlor may show indirectly that his object is to benefit the poor, though he does not actually say so. Thus in *Re Dudgeon* (74 L. T. 613) the testator bequeathed the fund to the rector and churchwardens of St. N., and Mr. Justice Stirling (as he then was) said that they were people much drawn into contact with poverty, and as the income was to be distributed among respectable single women of good character above the age of sixty, but so that the total in each case should not exceed four shillings a week, he could not imagine that any sane testator had anything in his mind in such a case, if it were not the relief of distress. Lord, then Mr. Justice, Russell, followed that case in *Re Lucas*, [1922] 2 Ch. 52, where the gift was of income to "the oldest respectable inhabitants in Gunville to the amount of five shillings per week each", and his Lordship held that the class of persons who were to be benefited were persons to whom the receipt of that sum would be of importance and a benefit. A philosopher has defined "enough" as "a little more than we have got", but no one could say that five shillings a week was of importance or a substantial benefit to a rich person, whereas to the very poor it would constitute a great help.

Our law is not logical, or why should a gift for charitable or benevolent objects be invalid, while such an abstract gift as "unto my country England to and for . . . own use and benefit absolutely" (*Re Smith*, [1932] 1 Ch. 153 C. A.) is good? On the strict wording of the last-mentioned gift, "benevolent" as opposed to strictly "charitable" objects would be included in the benefit of England. The gift has a fine patriotic ring about it, and it is well that it could be upheld, although in *Att-Gen. v. National Provincial and Union Bank of England*, [1924] A. C. 262, the House of Lords held that "patriotic purposes" are not necessarily charitable. Further, in the recent case of *Re Baynes*, 89 Sol. Jo. 34, Mr. Justice Vaisey followed *Re Smith* and held that a gift to the Common Good Fund of the Leven Town Council, Leven, Fife, was a good charitable gift. The fund consisted of a fund or properties under the control of the municipal authorities for the benefit of the borough or its inhabitants. The learned Judge pointed out that the law on this subject was in great confusion, and we respectfully agree, but there is often a hope that the intended public gift may come within the fourth category described by Lord Macnaghten, and be held valid.

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## CONCURRENT INTERESTS.

### III.

#### WHEN LAND IS HELD IN UNDIVIDED SHARES.

##### (i) WHAT IS *an undivided share*.

As indicated in the first article of this series on concurrent interests, one of the peculiarities of the legislation is the use of the undefined expression "undivided shares". The expression scarcely appears in standard text-books prior to 1926. In Williams' *Vendor and Purchaser* it is used, also without explanation, but there it *appears* to be synonymous in the mind of the learned author with tenancy in common. In Stroud's *Judicial Dictionary*, p. 2124, it is referred to only in connection with the Settled Land Act, 1882, s. 2, and the decision that a tenant in common has land within the definition of land in the Settled Land Act to include an undivided share: *Cooper v. Belsey*, [1899] 1 Ch. 639. In Wharton's *Law Lexicon*, 14th ed., published after the Act, it is stated that all concurrent interests, *i.e.*, joint tenancy, coparcenery, tenancy by entireties and tenancy in common are undivided shares, but that since 1925, by necessary implication, joint tenancy is the only form of undivided share which can subsist in a legal estate notwithstanding that the Law of Property Act, 1925, generally does not permit undivided shares to subsist in land: see section 28 (1). This not very happy interpretation of the Act receives some support from Edwards' *Law of Property in Land* (5th ed., 1922), which asserts that undivided shares include joint tenancy and tenancy in common. On the other hand, Elphinstone's *Introduction* (pp. 507, 524) uses the expression undivided shares

certainly in the sense of tenancy in common and, perhaps, exclusively in that sense. The expression appears in Challis' *Real Property* (3rd ed.) in connection with tenancy in common, where the learned author (at p. 346) says: "But the undivided shares of tenants in common are, for all purposes except physical possession, separate tenements, of which they are solely seised; and therefore dower may be claimed of *such* (a) undivided shares. And for this purpose the estate of a coparcener is a separate tenement, and dower may be claimed of it". On the other hand the same learned author says (at p. 367) in connection with joint tenancy: "In another sense each has an aliquot share; namely, for purposes of alienation, whether total or partial, and for purposes of forfeiture". It seems clear both from this passage and from the passage in Co. Litt. f. 186a, on which it appears to be based, that in the opinion of these learned authorities a joint tenant had a share and clearly it must be undivided since the whole point of joint tenancy was the indistinguishable character of the interests of the several joint tenants.

*Preston on Estates* (vol. 1, p. 136) is even more emphatic: "Joint tenancy is when several persons have any subject of property jointly between them, *in equal shares*, by purchase" (the italics are, of course, ours). "During the time they are to hold jointly, neither of them has an estate in any particular part. Each has the whole and every part, with benefit of survivorship, unless the tenancy be severed. . . . The real distinction is, joint tenants have the whole for the purpose of tenure and survivorship, while, for the purpose of immediate alienation, each has only a particular part": cf. 2 Prest. Abs., pp. 62, 63.

In fact, of course, the vital distinction between the "share" of the joint tenant and the "share" of the tenant in common was in ancient law clearly brought out with reference to conveyances by one tenant to another. In joint tenancy they had a joint seisin and consequently release was the only appropriate method of conveyance. In tenancy in common the tenants held "quite distinct estates" in the land and so feoffment with livery of seisin was the correct method of conveyance: Shep. *Touchstone* (4th ed.), p. 326, note (r). "Each tenant in common has, in contemplation of law, a distinct tenement, a distinct freehold, etc.": *Preston on Estates* (vol. 1, p. 139).

As against these works of authority there can be no doubt that in the cases on joint tenancy, particularly in wills, the use of the word "share" was inclined to increase the leaning of the Courts in modern times to construe a gift as a tenancy in common: see, e.g., *Jones v. Jones*, 44 L. T. 62. It is respectfully submitted that this is a modern tendency and due to the reason given by Joyce, J., for the preference for tenancy in common in *Re Woolley*, [1903] 2 Ch., at p. 211: "Not one ordinary person in twenty, I doubt whether one in a hundred, not being a lawyer, has the slightest idea that a devise or bequest to several nominatim, or to a class of persons without more, does not confer upon each a several and separate share which would pass to his representatives". Even in this case it is to be noted that the emphasis is not on the shares but upon their being separate and several. So, in

an older case, a gift to A and B "jointly and equally" was a joint tenancy: *Cookson v. Bingham*, 17 Beav. 262, and in one of the most recent cases the subsequent use of the expression "share" did not prevent the creation of a joint tenancy where previously no words of "severance" were used: *Re Schofield*, [1918] 2 Ch. 64. Perhaps, it is most interesting that a devise to "right heirs" created a joint tenancy; it could not be a coparcenery since that can be created by descent only and was not a tenancy in common for want of words of severance: *Owen v. Gibbons*, [1914] 2 Ch. 243.

It is submitted, therefore, that joint tenancy is property held in undivided shares as much or more than tenancy in common. This would have some important ramifications when it is remembered that an undivided share cannot exist save in accordance with the Law of Property Act, 1925, and the Settled Land Act, 1925. For example, if A grants Blackacre to B upon trust for C and D in equal shares. Here B cannot hold as a joint tenant with anyone and C and D do not take undivided shares as expressed in section 34 (2) of the Law of Property Act. It would appear superficially that C and D take nothing and that B takes on a resulting trust for the grantor. It is, of course, impossible to prophesy the results of this type of draftsmanship, as may be seen from the decision in *Re Wakeman*, noted on another page (b).

It is to be noted that there is nothing to exclude joint tenancy from the expression "undivided shares" but only certain rules for the creation of joint tenancy. It is submitted that the *probable* interpretation of the Act is that for the purposes of the property legislation the expression "undivided shares" excludes joint tenancy. On this assumption the further question arises whether it includes anything else besides tenancy in common, for notwithstanding the peculiar twist on the older authorities it must be so treated: *Re House*, [1929] 2 Ch., at p. 171; cf. *Cooper v. Belsey*, [1899] 1 Ch. 639.

The only real guide to the ambit of "undivided shares" for the purposes of the Law of Property Act is *Re Fuller's Contract*, [1933] Ch. 652. Here it was held that property vested in joint tenants as part of the partnership assets was held in undivided shares for the purposes of the Act, notwithstanding that for some purposes beneficially the partners are not tenants in common: see *Re Bourne*, [1906] 2 Ch. 427. This shows an inclination to treat undivided shares in a wide sense.

Consequently, it is thought that notwithstanding that coparceners more nearly approximate to joint tenants than tenants in common: see Co. Litt. 163a; Challis R. P. 372, they must, nevertheless, be regarded as holding land in undivided shares for the purposes of the 1925 legislation: cf. 2 Prest. Abst. 68. "Parceners, though they have a unity, have not an entirety of interest": Bl. Comm. II, p. 187. "Their right to the possession is in common and they have several and distinct estates": 1 Prest. Estates, p. 137. As it would seem that the emphasis must be put upon "share" rather than upon "undivided", this fact seems to show that coparcenery would be

(b) Compare also the unexpected effect in *Re Craven S. E.*, [1926] Ch. 985; *Re Kempthorne*, [1930] 1 Ch. 268; *Bernhardt v. Galsworthy*, [1929] 1 Ch. 549; all examples of the intention of the legislation being frustrated by inadequate expressions.

included, notwithstanding that "jointly" may include coparcenery (but also, perhaps, tenancy in common) in another context: *Re Greenwood's Trusts*, 27 Ch. D. 359, but cf. *MacMurray v. Spicer*, L. R. 5 Eq. 527. Since there is no right of survivorship in coparcenery it is obviously within the kind of mischief aimed at by the legislation. This should be another reason for its inclusion. In fact, it is of very little importance to-day since it seems that a new case can arise after 1925 only in a very small number of instances of which the commonest would be inheritance under a general entail. Another rarer but more difficult case is that of the widow who has dower which has not been assigned. *Prima facie* she would not be entitled in undivided shares, because at common law, "until such assignment she had . . . no estate in any part of the intestate's land": *per* Cozens-Hardy, M.R., in *Williams v. Thomas*, [1909] 1 Ch., at p. 719, Equity, however, intervened and gave the widow, prior to an assignment, a right to a third of the rents and profits. This right in equity to a third of the rents and profits until assignment and assignment of a third of the land by measurement was described by Cozens-Hardy, M.R. (*supra*, at p. 721) as "one right divided into two parts", and on this ground he held that it was not necessary to claim assignment to be protected by receipt of rents and profits so as to obtain an assignment more than twelve years after the intestate's death. In the case the other two learned Lords Justices likened assignment by analogy to partition. It is submitted that this equitable character of the widow's right to a third of the rents and profits is the material issue. Such a view is in line with the decision in *Re Fuller's Contract* (*supra*) where Luxmoore, J., arrived at his decision upon the principle enunciated at p. 656: "Of course, between the partners the partnership property must be dealt with in a particular way, but so far as all the rest of the world is concerned, there is no limitation on the interest of the partners; the partners have the beneficial interest in the partnership assets, which are held together as an undivided whole, but they respectively have undivided interests in them". At law, of course, the partners were joint tenants, and in the case of dower the legal estate would be held in severalty by the heir, but it is submitted that the determining feature in *Re Fuller's Contract* (*supra*) was not the position of the legal estate but of the equitable interest.

There is, of course, this distinction that as joint tenants partners cannot hold the property under section 36 of the Law of Property Act, 1925, unless they are entitled *beneficially* as joint tenants. But then section 34 of the Law of Property Act only applies in terms to a conveyance to persons in undivided shares and, if that expression is deemed to exclude joint tenancy (as it would seem that it must), the partners do not fall directly within that section either. Consequently it is submitted that a descent to an heir in severalty but to be held in undivided shares during the life of the widow would not be inconsistent with the earlier decision but in line with it.

This wide interpretation of the nature of undivided shares is supported by the other decision on "undivided shares" created after the Acts, namely, *Re House*, [1929] 2 Ch. 166. Here, a testator had directed certain annuities to be paid and subject thereto and

during the lives of annuitants the income of the land was to be divided equally between a class and after the death of the annuitants there was a trust for a class as tenants in common. Clauson, J. (as he then was) held that he was bound by three decisions on the transitional provisions (see at p. 171) and that as the income was to be paid to persons in undivided shares it was land held in undivided shares. It should be said at once that these decisions have been made notwithstanding that there is no reference to the "income" of land in the statutory definition.

The three decisions followed were: *Re Flint*, [1927] 1 Ch. 570; *Re Higgs and May's Contract*, [1927] 2 Ch. 249, and *Re Robins*, [1928] 2 Ch. 721. *Re Robins (supra)* is the only case in which the question was seriously discussed and has the disquieting observation by the learned Judge (Tomlin, J.) (at p. 731): "What view I might have taken about the matter, if it had been *res integra*, I do not know". In this case there was a trust to pay income to certain persons in equal shares and after their death upon trust for sale. At the relevant date the trust for sale had not arisen, but it was held (in conformity with *Re Higgs and May's Contract (supra)*) that the land was then held in undivided shares. Actually *Re Higgs and May's Contract (supra)* goes further because the beneficiaries were to receive the income from the proceeds of sale under a trust for sale. Before proceeding to another line of cases concerned with shares of income we should point out two things. First, *Re House (supra)* was concerned with the trusts of a will, that is the interest fell within sub-section (3) of section 34 and, though it is clear authority for what constitutes undivided shares in land, it does not deal with the problem under section 34 (2) where the conveyance is expressed to be to A upon trust for B and C in undivided shares or, for example, as part of partnership property. There the legal estate is expressed to be conveyed in severalty. Secondly, the matter *may* be of importance in turning all trustees for sale of land, who hold the proceeds of sale for persons in undivided shares, into trustees for sale holding on the *statutory* trusts for sale, but it is submitted that neither *Re Robins (supra)* nor *Re House (supra)* go so far as that and *Re Higgs and May's Contract (supra)* is clearly distinguishable as applicable only to the transitional provisions.

The discussion in *Re Robins (supra)*, however, clearly puts us upon another line of inquiry. In that case it was argued that *Re Higgs and May's Contract (supra)* was inconsistent with *Re Frewen*, [1926] Ch. 560. Tomlin, J., said (at p. 731): "I think that it may well be capable of being distinguished", but the learned Judge did not explain how, since he was concerned primarily to make decisions on the transitional provisions conform. In *Re Frewen (supra)* the income was to be paid as to two-thirds of the net income to a tenant for life and as to one-third upon the trusts subject to which capital moneys for the purposes of the Settled Land Act should be held. Lawrence, J., held that neither the life tenant nor the trustees were entitled to the income within sections 19 and 20 of the Settled Land Act, 1925, but that, therefore, the trustees were statutory owners under section 23 of that Act. It does not appear to have occurred to anyone to argue that the income was enjoyed in

undivided shares (it was clearly held not to be enjoyed in severalty or jointly), but it is somewhat difficult to see what interests were enjoyed if not concurrent interests. Nevertheless much the same principle seems to have been adopted in *Re Bird*, [1927] 1 Ch. 210 (not referred to in *Re Robins (supra)*) where on January 1, 1926, the land was vested in trustees upon trust to pay certain annuities and subject thereto as to income and capital for certain persons who should attain twenty-one, only one of whom had done so. Clauson, J., held that the land was settled land and that the trustees were statutory owners under section 23 of the Settled Land Act because one-third of the income was payable to the person who had attained twenty-one and the remainder was to be accumulated to follow the corpus. The one person might be "entitled to possession of settled land; but having regard to the definition of 'land', and exclusion from land of an undivided share, I cannot see how that circumstance can possibly bring him within the category of a tenant for life": see at p. 217.

It is submitted that the only possible distinction between these two cases and *Re House (supra)* and *Re Robins (supra)* is that some shares were not enjoyed beneficially though others were. This appears to coincide with the decision in *Re Stevens and Dunsby's Contract*, [1928] W. N. 187, where a testator directed trustees to accumulate certain income and subject thereto to pay the income to grandchildren as tenants in common, and Romer, J. (as he then was) held that the grandchildren were tenants for life under section 20 (1) (viii) of the Settled Land Act, 1925. It also coincides with the decision in *Re Stamford and Warrington*, [1927] 2 Ch. 217, where tenants in common were subject to an outstanding term in respect of which the trustees were in possession and it was held that the trustees took the legal estate.

It should be pointed out that shares vested in trustees upon derivative trusts have been treated as "undivided shares": *Re Cliff*, [1927] 2 Ch. 94; *Re Hayward*, [1928] Ch. 367. Presumably "beneficially" must have regard to the ultimate and not immediate destination of the income. Obviously some person must ultimately benefit, but if there is no beneficiary immediately enjoying the income directly or through payment to a third party the Court seems to adopt the view that the land is not held in undivided shares.

These cases show that undivided shares, though vested in possession, do not automatically invoke section 36 of the Settled Land Act where the tenants in common are not all entitled beneficially to the income. They appear to represent an exception to the rule stated that undivided shares in possession can only exist under a trust for sale. We have said "appears" because it is assumed that the decisions (all of them early ones) are not inconsistent with other decisions and also it is thereby assumed that an undivided share in income is the same thing as an undivided share in land. In a manner of speaking income has not the same characteristics as land, namely, that if trustees are to pay one-third of an income they can only make a several payment, and if the trust is to pay the net income this fact becomes more marked. But, if following *Re Higgs and May's Contract (supra)* we are to treat undivided shares in the proceeds

of sale as undivided shares in land for the purposes of the property legislation then it seems clear that income of land whether or not it is "net income" must be treated as land. We seem to arrive at the peculiar position of having an undivided share capable of subsisting without other corresponding undivided shares.

In our opinion this is the present position of the law and practitioners consequently must act upon it. It will be observed that the rules are as important for not creating a statutory trust for sale, for example, in respect of a devise by will as they are for creating one. So, for instance, if A directs his trustees to set aside one-third of the income of his land for paying annuities, etc., and to pay the remaining two-thirds in undivided shares, properly speaking the personal representatives will have to determine whether or not an assent will have to take the form of a vesting assent. No doubt much protection for titles can be obtained by proper reliance upon section 36 (7) of the Administration of Estates Act, 1925, but, of course, this does not provide complete protection: *Re Duce and Boots' Contract*, [1937] Ch. 642. It seems to us that of all the problems provided by "undivided shares" as an expression, the one likeliest to cause most difficulty in the light of the present authorities is that of ascertaining in what circumstances a share or shares of "income" are to be treated as bringing the "land" within the scheme of the Property Legislation.

#### (ii) CREATION OF AN UNDIVIDED SHARE.

From what has been said it will be observed that the only form of undivided share that can be created directly arises either by severance of a joint tenancy or alienation of coparcenery or by a grant in tenancy in common or a gift of shares of incomes. Neither coparcenery nor dower can arise save by descent. Severance of a joint tenancy requires special treatment and is left to the next section of this article.

There are numerous decisions which determine whether or not a gift to two or more persons constitutes a tenancy in common. Because we are accustomed to use a common form we are apt to overlook the number of cases, particularly in wills, in which the common form is not employed and, therefore, it is not necessarily obvious whether or no a joint tenancy is created. To deal exhaustively with the subject would weary the reader, but a few points may be of assistance.

It is, of course, common knowledge that a grant to two or more persons without more of an equal interest taking effect in possession at the same time operates to confer a joint tenancy at law. It does not necessarily operate similarly in equity. But it is first important to remember that the requirement of the "same time" is a common law requirement and did not apply to grants which operated under or by analogy to uses. "Though at the common law joint tenants must be capable of taking at one and the same time; yet under the learning of uses and executory devises, persons may be joint tenants who take at different times; thus, under a devise, or limitation to the use of the children of A, the estate may vest altogether in one; afterwards when a second child is born, then in two . . .": 2 Prest. Abs. 67. It should be borne in mind that the Statute of Uses is abolished, but

a gift to a class or to several persons to take at different times will almost inevitably operate in equity only and the rule that the interposition of a use was not necessary to an executory devise seems to cover all cases in equity. Hence when there is a gift to a class without more it would seem to constitute a joint tenancy at the present day notwithstanding that members of the class take at different times : cf. *Re Woolley*, [1903] 2 Ch., at p. 211.

Broadly speaking, joint tenancy can be excluded, apart from inequality of interest, where either the grant contains words of limitation expressing distinct and several shares in undivided possession or subsequent words appear which destroy the joint tenancy, or there are some external features which at least in equity destroy the joint tenancy, such as partnership.

As has been indicated above it is necessary to use words showing that a grant to persons concurrently is to be held in several shares, hence the common form "in equal shares", to denote a tenancy in common. There are, however, no particular forms. So, where the beneficiaries were to "participate" a tenancy in common was created : *Robinson v. Fraser*, L. R. 6 Ch. 696; where the income was "to be paid" to several persons it was also a tenancy in common : *Re Clarkson*, [1915] 2 Ch. 216; and even an advancement clause constituted several and distinct shares : *Re Dunn*, [1916] 1 Ch. 97; cf. *Re Ward*, [1920] 1 Ch. 334, for maintenance clause. On the other hand, the later description of the interest of concurrent interests as shares without immediate words of sharing did not prevent joint tenancy : *Re Schofield*, [1918] 2 Ch. 64; nor did a gift to a married woman for her separate use with restraint upon alienation : *Re Gardner*, [1914] 2 Ch. 243. Although coparceners do not hold as joint tenants, a gift to "right heirs" under which coparceners took by purchase constituted a joint tenancy : *Owen v. Richards*, [1902] 1 Ch. 636, and presumably this would, in similar circumstances, be the effect of section 131 of the Law of Property Act, 1925, which abolishes the Rule in *Shelley's Case*.

This small selection of cases, most of comparatively recent times, will show that the question of the existence of a joint tenancy is one of some importance. Indeed, it has become of greater importance than formerly owing to the fact that the title to the legal estate can easily be affected by this distinction irrespective of the right of survivorship on which most of the older cases turned. It is clearly a matter of construction in some measure whether or not words creating several shares have been used except where the shares are unequal when, of course, it cannot be a joint tenancy. At the same time the construction of any words indicating several shares depends upon the instrument itself and the cases are numerous : see Jarm. Wills, pp. 1768—1777.

In all these cases, however, there is some evidence in the instrument creating the interest by which the practitioner can be put on notice at least. The importance of "undivided shares" depending upon a beneficial interest, however, is that in equity there may be a tenancy in common notwithstanding that the grant is made to the grantees expressly as joint tenants or, perhaps, where the grant is made to one person in severalty.

One clear example of this we have mentioned, namely, where the property is conveyed to grantees for the purposes of a partnership. Under the old law and having regard to the old doctrine of notice of equities it was not uncommon to convey to one or more of the partners, and if more than one as joint tenants without disclosing the partnership. Perhaps the commonest practice was to convey to the partners as joint tenants as part of the partnership property which impressed the legal estate with a trust to sell by way of realisation: *Re Bourne*, [1906] 2 Ch. 427; *Elph. Introduction to Conveyancing* (7th ed.), 366. Having regard to the present position this would seem to be the proper course to pursue.

Another and much more difficult case (fortunately much more uncommon) arises where the purchase money is found in unequal shares. This, *prima facie*, raises a tenancy in common in equity: *Lake v. Craddock* (1732), 3 P. W. 158, but the facts are not necessarily disclosed in the conveyance. Apart from the simple but not always desirable expedient of expressing the shares of the purchase money it is suggested that the conveyance should in such circumstances always be expressed to the grantees upon the statutory trust for sale for the grantees beneficially in undivided shares, unless the tenancy in common is intended in fact to be excluded, *e.g.*, where the grantees are parent and child.

It is also true that mortgage money found in unequal shares constitutes the mortgagees tenants in common of the principal: cf. *Re Jackson* (1887), 34 Ch. D. 732, but this has not the importance of the other cases because (a) there is no trust for sale and consequently no need for appointment of new trustees, and (b) there is the express provision for the joint account clause in section 111 of the Law of Property Act, 1925.

Perhaps, however, from the point of view of title more troublesome than the initial creation of undivided shares is the severance of a joint tenancy during its continuance. We have already noted the problem of the effect of severance in settled land, but, where the land is not settled land and this is the common case, the severance during the continuance of the joint tenancy maintains the trust for sale even after the death of all the joint tenants with consequent effect upon powers of disposition and enjoyment.

### (iii) SEVERANCE OF JOINT TENANCY.

At common law the severance was made by alienation by one joint tenant to a third party: Co. Litt., ff. 188b, 189a. This to-day cannot create a tenancy in common at law but only in equity and has the somewhat peculiar result that in order to enable the alienee to get the benefit of the common possession which is the hall-mark of tenancy in common: Co. Litt. f. 187; the alienee must also get the removal from the trusteeship of the alienor and himself appointed trustee in his stead. Thus if A, B and C are joint tenants legally and beneficially and C sells to D, D gets only a third share in the proceeds of sale and C remains joint tenant of the legal estate. It is submitted that D can only obtain the legal estate with the consent of A and B who must concur in C's retirement and B's appointment as new trustee.

Where the joint tenancy exists in settled land: cf. *Re Gaul and Houlston's Contract*, [1928] Ch. 689, where the joint tenancy was in fee simple subject to outstanding limitations, it is by no means clear that D could get the legal estate at all by reason of the Settled Land Act, 1925, s. 104, because the powers of estate owner are vested in C jointly with A and B. If this is correct the limitation on severance is even more restrictive.

Where the joint tenancy is not settled land severance may also be effected by serving written notice on the other joint tenants: Law of Property Act, 1925, s. 36 (2). There is nothing to enable a purchaser to know whether such severance has in fact been made and the legal estate vested in a sole surviving joint tenant is not thereby released from the statutory trust for sale, though the severance does not operate on the legal estate.

Neither of these cases, however, are *likely* to cause much difficulty because there is an intentional severance, and in all probability the surviving joint tenant would not try to make a title without disclosing the tenancy in common and thereby the continuance of the trust for sale. What, however, is, perhaps, not so well known or realised is that a joint tenancy can in certain cases be severed in equity by conduct. Such a severance may easily be overlooked and the continued existence of the trust for sale, at any rate on one view of the effect of the 1925 Legislation, be disastrous.

Most of the examples of severance by conduct occur with reference to personalty, but it must be borne in mind that the beneficial interest of joint tenants is an interest in the proceeds of sale and therefore personalty: *Re Kempthorne*, [1930] 1 Ch. 268; save where the joint tenancy is settled land.

The following are examples of severance by conduct. Where personalty was *used* in partnership business: *Jackson v. Jackson*, 9 Ves. 591. If property was conveyed to man and wife and subsequently they carried on business, *e.g.*, as dairy farmers, would it cause severance? A covenant to settle property to which the covenantor was only entitled in expectancy as joint tenant caused severance: *Baillie v. Treharne*, 17 Ch. D. 388. A contract to sell his interest by one joint tenant will also sever the joint tenancy: *Brown v. Randle*, 3 Ves. Jun. 257, because equity would grant specific performance. This was carried further when it was held that a covenant to settle after acquired property operated to sever a joint tenancy so soon as the property was acquired by the settlor: *Re Hewitt*, [1894] 1 Ch. 362. This is peculiarly awkward from the point of view of title since it does not directly affect the property, but it is, perhaps, less likely to occur than the case of what for convenience we will call "mutual wills". If the joint tenants agree to make wills leaving the property to one another for life with gifts over this will operate as severance from the death of the first joint tenant: *Re Wilford's Trusts*, 11 Ch. D. 267.

It is submitted that in such a state of the law reliance cannot be placed upon the amendment to sub-section (2) of section 36 of the Law of Property Act, 1925, permitting a sole surviving joint tenant absolutely entitled from dealing with the property independently of the Act. So soon as the joint tenancy is severed the statutory trust

for sale must continue as long as the tenancy in common continues and a purchaser can only get a good title by a receipt from not less than two trustees : section 27. The purchaser has notice of the existence of the trust for sale in the first place and there is nothing in either section 27 or the amendment to section 36 (2) which relieves him if it has not in fact come to an end.

We have ventured to devote so much space to the problem of the existence of undivided shares because not only is the legal estate affected in manner already discussed in previous articles, but the peculiar rules which affect tenancy in common also seem to affect enjoyment as well as title to the property. It is hoped to deal with this aspect of the question in another article.

## CHARITIES AND CONVEYANCING.

By E. O. WALFORD, LL.D.

(Continued from p. 149, ante.)

### 6. "Held on Charitable, etc., Trusts."

Section 29 (1) refers to land *held on (inter alia)* charitable trusts. It appears that the Charity Commissioners take the view that the conveyances here referred to are conveyances which at the date of the conveyance are *already* held on charitable, ecclesiastical or public trusts. Thus, if the view of the Charity Commissioners is correct, where land (including buildings) not yet subject to charitable trusts is conveyed to persons who will, immediately upon the execution of the conveyance in their favour, hold the land upon charitable trusts the conveyance need not state the trusts upon which the trustees hold the land or buildings. It must be admitted that such an interpretation makes it extremely difficult to understand the effect of the later words of the sub-section which state that a purchaser who has notice of the trusts is bound to see that any requisite consents or orders have been obtained. If the Commissioners' view is right the kind of conveyance in which it is to be stated that the land is held on charitable trusts is one where the property is already held on charitable trusts and the trustees will be conveying it. But the conveyance will be drawn by the purchaser who will know nothing of the trusts if the conveyance to the trustees did not mention them, and to expect the charity or its solicitor to insert a statement that it is held on charitable trusts is to ask him to invite unnecessary trouble. Read as a whole, the words of the sub-section indicate the intention that an assurance which is in fact a conveyance (in the parlance of earlier statutes) "to charitable uses" is to reveal that fact. A purchaser will then have notice and he will be bound to see that any requisite consents or orders are obtained. However, upon a literal interpretation of the words of the section the view of the Charity Commission is correct.

### 7. Practice Note.

It does not seem satisfactory where land is taken by trustees on charitable trusts to omit a reference to that fact. Whilst it is not usual for trustees of a charity to dispose of trust property and embezzle the proceeds there is no point in facilitating such action by omitting to refer to the fact that the trustees *do* hold the property upon charitable trusts.

It may happen that a charity has collected, say, £1,000, for the purpose of acquiring a certain building which it is intended to use for the purposes of the charity. Let us assume that the purchase price of the property is £1,500. The property cannot be held upon trust for the charity before it is conveyed to the charity or its trustees, but directly it is so conveyed it *will* be held upon trust for the charity. Hence, if the trustees are proposing to provide part of the purchase price by borrowing the extra £500 (£1,500 – £1,000) the consent of the Charity Commissioners will certainly be necessary in respect of the mortgage unless the case falls within one of the exemptions above mentioned or some other statutory exemption. It would also seem to the present writer that as the £1,000 has, as above stated, been collected for the express purpose of purchasing the property, it will, *eo instanti* that it is acquired, be held upon charitable trusts, but it will not be necessary to refer to those charitable trusts pursuant to section 29 (1) if the view of the Charity Commissioners as stated in paragraph 6, above, is correct. Nor would it seem necessary, subject to what is said below, to obtain the consent of the Charity Commissioners to the conveyance to the charity trustees; but the question of their consent to the mortgage remains.

### 8. Jurisdiction of Charity Commissioners under section 29, etc.

By section 29 (3) of the S. L. A., 1925, it is declared that nothing in that section affects the jurisdiction of the Court, Charity Commissioners, Board of Education, or other competent authority in regard to the administration of charitable, ecclesiastical or public trusts. Hence, even if it is proposed to sell in exercise of the Settled Land Act powers conferred by this section any necessary consent will still have to be obtained. If, however, land is given to a charity by will it would seem that the consent of the Charity Commissioners to a sale is unnecessary having regard to the express direction in section 5 of the Mortmain and Charitable Uses Act, 1891, that the land is to be sold within a year from the testator's death unless the Court or the Commissioners extend the period.

### 9. Exercise of section 29 powers optional.

To what extent is charity land subject by section 29 of the Settled Land Act, 1925, to that Act? The answer is supplied by the case of *Re Booth and Southend-on-Sea, etc., Co.'s Contract*, [1927] 1 Ch. 579, from which the position appears to be as follows:—

(1) Section 29 (1) does not make charity land settled land for all purposes, but only for the purposes of that section, and it is to be noted that the sub-section, in declaring that land vested in trustees for charitable purposes is to be deemed to be settled land, expressly uses the words “without constituting them statutory owners”, with the

result that they have in reference to the land all the powers of a life tenant and the trustees of a Settled Land Act settlement, but without bringing them within the technical position of statutory owners.

(2) Presumably, so far as any limitations or conditions are imposed on life tenants or trustees of a Settled Land Act settlement, the same limitations or conditions would apply to the trustees if and so far as they choose to act *in exercise of the statutory powers*.

(3) If, however, trustees have under (say) a deed of trust the powers which are required for carrying out a certain transaction they do not need to have resort to section 29. But whether they are exercising those powers or Settled Land Act powers they must obtain any necessary consents or orders of the Court or the Charity Commissioners.

(4) Under section 29 when the powers given by that section are exercised the position as read with sections 94 and 117 is that the moneys produced are capital moneys arising under the Act.

If capital money arises under the Act then sections 94 and 95 of the S. L. A., 1925, apply; but in a case where the property can be sold and the moneys applied as revenue, section 29 does not make the purchase money capital money, and where the powers which are exercised are powers expressly given by the deed the purchase money is not money arising under the Act within the meaning of section 94.

(5) Whilst the point was not expressly dealt with in the *Booth Case*, the Court appears to have accepted the argument of counsel for the vendor that no Charity Commission consent was necessary because, in the circumstances of the case, the property and its purchase money were applicable as revenue (*i.e.* as income). It must also have been assumed that the charity was a mixed charity at the date of the acquisition of the property. Otherwise exemption from the requirement of consent by the Charity Commissioners could not have been established (see "*Mixed Charities*", paragraph 3 above).

(6) In the *Booth Case* there was one sole trustee with power to sell on the footing that the proceeds of sale could be treated as revenue, and in that case the one trustee was in a position to give a valid receipt, not being fettered in this respect by the Settled Land Act or otherwise. The principles laid down in the *Booth Case* are not, however, confined to cases in which there is one trustee only, but apply to charitable trusts generally, although if exemption is claimed under section 62 of the Charitable Trusts Act, 1853, or otherwise, it will be necessary to show that a case for exemption under that section can be made out.

#### 10. Conditions Governing Exercise of Settled Land Act Powers.

It has already been mentioned that if the trustees have express powers authorising the intended dealing the trustees need not resort to section 29, but can operate under such express powers subject to any necessary consent or order of the Charity Commission or Board of Education. Section 29 of the S. L. A., 1925, contains certain express provisions concerning the exercise by the trustees of the Settled Land Act powers—

(1) *Consents or Orders*.—The powers are exercisable subject to any consents or orders which would have been requisite if the transaction were being effected under an express power conferred by the instrument creating the trust (section 29 (2)). See paragraphs 1–3 above.)

(2) *Property held by Official Trustee or Nominees.*—Where the land is vested in the Official Trustee of Charity Lands or other persons having no powers of management the Settled Land Act powers are to be exercisable by the managing trustees or committee of management, and the official trustee or other such persons as last mentioned are not to be liable for giving effect to directions given by the managing trustees or committee of management (section 29 (2)). Presumably the last part of that provision contemplates a resolution by the managing trustees followed by suitable action by, say, nominee trustees holding property belonging to the charity.

Although section 29 (2) contains no express reference to section 29 (1) it will be seen that those two sub-sections are, to some extent, dovetailed. Section 29 (1) refers to "land vested or *to be* vested in trustees or for charitable, ecclesiastical or public trustees". It seems impossible to determine without judicial guidance whether "land . . . *to be* vested" means land which is held on such trusts and which ought to be or could lawfully be vested in such trustees, or land which is about to be so vested, or land which becomes vested in such trustees after December 31, 1925. Perhaps the answer is a mixture of these alternatives.

Confining our attention to land *vested* in trustees it will be observed that the Settled Land Act powers are not necessarily exercisable by the persons in whom the land is vested; for if those persons have no powers of management the Settled Land Act powers are exercisable by the managing trustees (section 29 (2)).

(3) *Voluntary Dispositions and Acquisition of Land.*—By a very important proviso to section 29 (2) it is enacted (in effect) that where [*in the exercise of the Settled Land Act powers*]

(a) A disposition or dealing is to be effected for less than the best price or rent that can reasonably be obtained, or without any consideration; or

(b) any interest in land is to be acquired;  
the like consent or order (if any) is required in reference to the transaction as would have been requisite if it had been a sale.

As to clause (a) of the proviso, it is to be noted that a purchaser (including in this term a mortgagee) will be entitled to assume that full consideration has been paid: S. L. A., 1925, s. 110. If no consideration was paid, *e.g.*, upon the assignment of a leasehold interest held apparently at a rack rent, it is not clear that that section would protect a subsequent purchaser of that interest.

Clause (b) of the proviso is another provision which is difficult to interpret. The words within square brackets indicate that in the writer's view clause (b) is intended to refer only to acquisitions pursuant to the Settled Land Act powers conferred by this section. So far as concerns a *disposition* of property of the charity without consideration or for less than full consideration the sub-section is clear enough. But what is meant by the provision that in the case of the acquisition by the charity of an interest in land the same consent or order is required as if the acquisition had been a sale? Possibly the meaning is that one is to consider the circumstances obtaining at the date of the proposed or actual acquisition, both as to the source and applicability (*i.e.*, as to revenue or otherwise) of the moneys to be used for such

acquisition, and then to test the necessity for a consent or order by inquiring whether such consent or order would have been necessary if instead of buying the interest in question the charity had been selling it. Presumably it would be necessary to apply the tests mentioned in the last sentence as at the date of acquisition of the interest, so that one would be considering the position on the footing that the interest was being bought and sold on the same day. This point is dealt with at length because of its bearing upon the question whether the property would be exempt from the jurisdiction of the Commissioners (see "*Mixed Charities*", paragraph 3 above).

(4) *Receipt of Capital Moneys*.—Under section 94 (1) of the S. L. A., 1925, on the payment of capital moneys the receipt of at least two trustees is necessary unless the sole trustee is a trust corporation. It is not certain that this provision applies to moneys payable to trustees of a charity *exercising the Settled Land Act powers*; but it will be wise to assume that it does. On the other hand, where a person is the sole trustee of charity lands, and has full powers of sale and management, and is entitled to treat as income all moneys received on sales or other dispositions, nothing in section 94 of the S. L. A., 1925, or any other statute prevents him from giving a valid receipt for such moneys: *Re Booth*, [1927] 1 Ch. 579.

#### 11. Conveyances by Trustees.

For forms see *Conveyancer*, vol. 17, pp. 302—310, and preliminary note, p. 289 (e).

#### 12. Powers of Majority of Trustees.

In relation to any property *not* exempted from the operation of the Charitable Trust Acts, 1853—1869, a most useful statutory provision enacts in effect that the powers of the trustees to authorise any disposition of its property can be exercised by a majority of those present and voting at a meeting of the trustees, and such a majority (not necessarily those voting in favour of the proposal) can do everything necessary for carrying into effect such disposition with the same effect as if any requisite assurances, acts and things had been executed and done by all the trustees and by the Official Trustee of Charity Lands (if necessary): Charitable Trusts Amendment Act, 1869, s. 12. Of course, any requisite consent or order of the Charity Commission or otherwise must be obtained by the trustees.

There would seem to be no doubt that the section would enable such majority to convey the legal estate vested in all the trustees, and it would seem probable that the majority could also give a valid receipt for any moneys payable to the trustees.

By section 29 (5) of the S. L. A., 1925, it is enacted that where any trustees or the majority of a set of trustees have power to transfer or create any legal estate, that estate shall be transferred or created by them in the names and on behalf of the persons (including the Official Trustee of Charity Lands) in whom the legal estate is vested. As to the execution of deeds pursuant to a power of attorney (statutory or other-

(e) I am indebted to Mr. A. H. Withers for these references.

wise) see section 74 of the Law of Property Act, 1925. It is very important that that section should be examined before preparing a deed for execution by a majority of the trustees, and it is to be observed that it contains separate provisions concerning :—

- (a) The execution by a “person” of deeds on behalf of corporations, including a direction that the attorney is to affix *his own seal*, but is to sign the name of the corporation (*e.g.*, the Official Trustee of Charity Lands) : see section 74 (3).

No doubt “person” in this sub-section includes a corporation sole or several individuals, *e.g.*, the majority of a body of trustees. It is not clear that a statement that the trustees executing the deed have caused the name of the corporation to be signed by a specified trustee would suffice. According to the literal wording of the section it appears to require that *all* the persons who are to transfer or create the legal estate should sign the name of the corporation in question (as well as affixing their own seals).

- (b) The execution by a corporation aggregate of a conveyance of any interest in property in the name or on behalf of any person or corporation.

In such cases an officer appointed by the board of directors, council or other governing body of the corporation (by resolution or otherwise) may execute the deed on behalf of the principal (whether an individual or a corporation aggregate or sole). In favour of a purchaser a deed appearing to be executed by an officer so appointed is to be deemed to be executed by a duly authorised officer : see section 74 (4).

The precedent in the Supplement to the *Encyclopædia of Forms* (2nd edition) under the title “Landlord and Tenant”, being a form of lease executed by a majority of the trustees in the name of the Official Trustee of Charity Lands, appears to have been prepared in oversight of the above provisions and to be defective partly as to the form of the lease and partly as to execution (*i.e.*, the omission of the signature of the name of the Official Trustee).

As section 29 applies to trusts created before or after January 1, 1926 (except as to the substitution by sub-section (4) of recording for enrolment), the provisions of sub-section (5) as to transfer or creation by the majority of the trustees of legal estates apply to charities whenever constituted except as to land to which the Universities and College Estates Act, 1925, applies (*ibid.*).

## B. PURCHASE OF LAND BY CHARITIES.

### 1. Position prior to 1926.

(i) Generally, unless a charity had power under its trust instrument or by charter or statute to purchase land it could not do so without the consent of the Charity Commissioners or an order of the Court.

(ii) Even if the trust instrument authorised the trustees to purchase land it was necessary to obtain an order of the Commissioners sanctioning the purchase of land out of personal estate directed by will to

be laid out in the purchase of land: Mortmain and Charitable Uses Act, 1891, s. 8. Under that section the Commissioners or the Court were authorised to sanction the purchase if satisfied that the land was "required for actual occupation for the purposes of the charity and not as an investment". That Act applied to the wills of persons dying after August 4, 1891 (*ibid.*, section 9).

(iii) Although incorporated trustees of a charity subject to the Charitable Trusts Act, 1853, were authorised to purchase and hold lands for certain purposes without licence in mortmain, it was still necessary for them to obtain any necessary consent of the Charity Commissioners: see Charitable Trusts Amendment Act, 1855, s. 41, as read with section 27 of the C. T. A., 1853. If, however, the charity were exempt from the 1853 Act (*i.e.*, from the jurisdiction of the Commissioners) and possessed the power of purchasing land it could do so, subject, however, to the limitations specified in Part I above. But most charities are supported partly by income from endowment and partly by voluntary gifts and rank as mixed charities, with the result that they are not exempt *qua* charities from the operation of the Charitable Trusts Act, 1853. The fact that some of the properties or other investments of the charity were exempt from the operation of the Act would not, apparently, confer upon the *charity* exemption from the Charitable Trusts Acts. Hence incorporated trustees were in general entitled to purchase land if such purchase were authorised by the trust instrument notwithstanding the mortmain provisions of section 1 of the Mortmain and Charitable Uses Act, 1888 (see Part I above), but subject to the "REQUIREMENTS AFFECTING CHARITIES, ETC.", Part I, paragraph 3 above, and as to companies incorporated under the Companies Acts, subject to the provisions of section 14 of the Companies Act, 1929: see Part I above, paragraph 2 (1).

(iv) Any incorporated charity or the trustees of any charity, whether incorporated or not, might, with the consent of the Commissioners, invest money arising from the sale of land belonging to the charity, or received by way of equality of exchange or partition, in the purchase of land, and might hold such land, or any land acquired by way of exchange or partition, for the benefit of such charity without any licence in mortmain: Charitable Trusts Amendment Act, 1855, s. 35.

The points to be noted are: (a) That the consent of the Charity Commissioners was required; (b) that the exemption was in respect of mortmain only, and the limitations and requirements specified in Part I above, paragraphs 2 (1) and 3 apply; (c) that the section applied even where the trust instrument conferred no power upon the trustees to purchase land.

## 2. Position since 1925.

In general the position remains as stated above except that Settled Land Act powers are conferred on trustees by section 29 of the S. L. A., 1925. It will have been noted, however, that if the trustees are dependent upon the Settled Land Act, 1925, the provisions of section 29 (2) of that Act apply: see in that connection heading A above, clause (b) of paragraph 10 (3), and the observations on that clause (its meaning being difficult to determine with certainty).

## PART III.

*ENROLMENT AND RECORDING.*

The general rule is that all assurances to charitable uses must now be recorded in the books of the Charity Commission, or, in the case of educational charities, of the Board of Education: S. L. A., 1925, s. 29 (4). (See, however, "EDUCATIONAL TRUSTS" (Part V, *post*).) There are certain exceptions which will be stated later.

Since December 31, 1925, recording has taken the place of enrolment.

Certain of the provisions of earlier statutes concerning enrolment are mentioned in Part I of this article, paragraph 2 (2), and paragraph 3 A, and are shortly referred to under "Exemptions" below.

**1. Modern Requirements.**

A substantial change was made by section 29 (4) of the S. L. A., 1925, which relates only to assurances made after December 31, 1925.

The effect of that sub-section is as follows:—

Assurances made after December 31, 1925, of land or of personal estate within the meaning of section 4 of the Mortmain and Charitable Uses Act, 1888 (or if the charitable uses are declared by a separate instrument then that instrument) are to be sent within six months after they are executed or within such extended period as the Commissioners may allow, for recording in the books of the Charity Commission. The above provisions are substituted for the requirements of section 4 (6) and (9) of the Mortmain and Charitable Uses Act, 1888, respecting attestation and enrolment so far as concerns instruments executed after December 31, 1925.

Section 4 (6) of the Act provided that assurances of land or of personal estate other than stock in the public funds to charitable uses must be made by deed executed in the presence of two witnesses. Accordingly that requirement does not apply to deeds executed after December 31, 1925 (see Settled Land Act, 1925, ss. 119, 120).

Section 4 (9) of the Act provided that assurances of land or of personal estate other than stock in the public funds to charitable uses must be enrolled in the Central Office of the Supreme Court within six months after the making of the assurance, or where the charitable uses were declared by a separate instrument then that instrument was required to be enrolled within six months after the making of the assurance.

As sub-sections (6) and (9) of section 4, and also section 5 of the Act (which gave power to extend the time for enrolment) were repealed by section 119 of the Settled Land Act, 1925, only as to deeds executed after December 31, 1925, although the failure to execute such a deed in the presence of two witnesses cannot be rectified, apparently an extension of time could still be granted in respect of such deeds executed before January 1, 1926, provided that there were two witnesses and the conditions laid down in section 5 are satisfied. As to such conditions see Part I of this article, paragraph 3 (3) (a).

*Assurances within section 29 (4).—*For the purposes of

section 4 of Mortmain and Charitable Uses Act, 1888, an assurance "includes a gift, conveyance, appointment, lease, transfer (but as to registered land see below), settlement, mortgage, charge, incumbrance, devise, bequest, and every other assurance by deed, will or other instrument" (section 10), and "will" includes a codicil (*ibid.*). The assurance must be of land or of personal estate "within the meaning of section 4 of the M. and C. U. Act, 1888". That section does not refer to personal estate *simpliciter*, but to assurances of "personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses". By section 3 of the M. and C. U. Act, 1891, land, for the purposes of the 1888 Act (as well as the 1891 Act), is defined as including tenements and hereditaments, corporeal or incorporeal, of any tenure but not money secured on land or other personal estate arising from or connected with land.

It would appear from the foregoing provisions that all conveyances or assignments of *legal* interests in land would fall within section 4 of the M. and C. U. Act, 1888. "Tenements and hereditaments" include every species of realty. The word hereditaments extended to everything which might pass to an heir (*Lloyd v. Jones* (1848), 17 L. J. C. P. 206), or as it is put in *Touchstone*, at p. 91, which "may be inherited" (and see Co. Litt., 16a, 383 a, b). However, it has been laid down that the definition in the 1891 Act above mentioned merely excludes impure personality (*i.e.*, leaseholds) and does not otherwise restrict the meaning of "land": *Re Hume*, [1895] 1 Ch. 422. It is probable that an assurance of an equitable interest in land is an "assurance" within section 4 of the 1888 Act (*f*). In Williams on *Vendor and Purchaser* (4th edn.), vol. 1, pp. 492—494, it is argued at some length that even a contract for sale of land is an assurance of land within the meaning of section 4 of the M. and C. U. Act, 1888, and therefore subject to the requirements of that section or (if made after December 31, 1925) of section 29 of the S. L. A., 1925. This view and the grounds stated for it are doubtful; but the point is powerfully argued in the pages above mentioned. However, assignments of contracts for sale are not very common, and at the present day that point is not of any great practical importance for the following reasons:—

- (1) Most titles depending upon a contract for sale made before January 1, 1926, would by now have been remedied by the Statutes of Limitation: *Att.-Gen. v. Munro* (1845), 2 De G. & S. 163; *Att.-Gen. v. Gardner* (1847), 2 De G. & S. 102; *St. Mary Magdalen, Oxford v. Att.-Gen.* (1857), 6 H. L. Cas. 189.
- (2) As to contracts made on or after January 1, 1926, these will generally have been completed by the execution of a con-

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(*f*) In Williams on *Vendor and Purchaser*, 4th edn., vol. 1, p. 492, referring to the Act of 1891 the authors state that "It is certainly open to argument that this amendment had the effect of confining the operation of the Act of 1888 to assurances of the legal estate in hereditaments", citing *Gentle v. Faulkner*, [1900] 2 Q. B. 267. The authors point out that if that view were correct a declaration of trust under hand would transfer the equitable estate in the land without complying with s. 4 of the 1888 Act as varied by the Settled Land Act, 1925, s. 29 (4); and that the Courts would struggle against this conclusion. Practitioners should accordingly assume that such declarations and assignments of equitable interests in land are assurances of land within the meaning of s. 4 of the Act of 1888.

veyance. Thus the assurance of which the validity will fall to be tested will not normally be the contract for purchase, but the later assurance effected on completion. Moreover

- (3) In the case of contracts for purchases made since December 31, 1925, the requirement as to two witnesses no longer applies, and any default in recording the assurance can normally be remedied with the consent of the Charity Commissioners, pursuant to section 29 (4) of the S. L. A., 1925.

The normal appointment of new trustees does not require to be recorded. Although it is an "assurance" it does not usually constitute a record of any new charitable trust. If it does so, it may be recordable as a "separate instrument" declaring the charitable uses within the meaning of section 29 (4) above.

## 2. Effect of Failure to Record.

It will have been noted that the provisions of section 29 (4) concerning deeds executed after December 31, 1925, are expressed to be "in substitution for" the requirements of section 4 (6) and (9) of the M. and C. U. Act, 1888, which Act avoided deeds of the specified kinds if they were not enrolled as required by the Act. Notwithstanding the contrary view expressed in *Tudor's Charitable Trusts* (5th ed.) it is submitted that failure to comply with section 29 (4) as to recording leaves the assurance in question void; and it is observed that a similar view is expressed in Williams on *Vendor and Purchaser*. But as recording can be effected out of time, apparently such assurances may be validated at any time in the absence of special circumstances (but at the risk of substantial delay). Possibly in the event of an intervening claim by a third party prior to an application to extend the time the Commissioners might refuse to record so as to prejudice the rights of any such third party; but I know of no ruling on this point.

## 3. Application of section 29 (4) of S. L. A., 1925.

Although section 29 applies save as otherwise provided to trusts created before or after the commencement of the Act (January 1, 1926), it does not apply to land to which the Universities and College Estates Act, 1925, applies (section 29 (5)), and it is expressly provided by section 29 (4) that that sub-section (which substitutes recording for enrolment) only applies to documents executed after December 31, 1925.

## 4. Wills and Assents.

By section 29 of the Settled Land Act, 1925, all assurances within the meaning of section 4 of the Mortmain and Charitable Uses Act, 1888, are, if made after December 31, 1925, as above stated, to be recorded with the Charity Commission, or in the case of educational trusts with the Board of Education (see paragraph 1 above). Upon reference to Part I, paragraph 3 A of this article it will, however, be observed that section 4 of the Mortmain and Charitable Uses Act, 1888, prescribes such conditions in connection with "assurances" that a gift by will could not possibly comply therewith, and it appears from the decision in *Re Hume*, [1895] 2 Ch. 422, that an assurance by will is not to be regarded as an assurance within section 4 of that Act.

Accordingly, if the matter rested there it might be said that an assurance by will to charitable uses was exempt from enrolment or recording except in the cases mentioned in Part I, paragraph 2 (2) (b) above. On the other hand it may be argued that when the personal representatives assent to the vesting in the charity of the land devised by the testator the assent is an assurance within the meaning of section 4 of the Mortmain and Charitable Uses Act, 1888, and that the will is the "separate instrument" (within the meaning of section 29 (4) of the Settled Land Act, 1925) declaring the charitable uses and must be recorded accordingly. That view is expressed by the learned editors of *Tudor on Charities*. The Charity Commissioners, whilst pointing out that a conclusive decision can be given only by the Courts, have, however, expressed the view that neither a will nor an assent requires to be recorded pursuant to section 29 (4) of the Settled Land Act, 1925. But it will be noted that an assurance by will of land or of personal estate to be applied in or towards the purchase of land to a certain extent and for certain purposes is required pursuant to section 6 of the M. & C. U. Act, 1888, to be enrolled (see the next succeeding paragraph 5 (4), and as to extension of time see also paragraph 6 below. See also Part I, paragraph 2 (2)). The requirement of enrolment of such assurances does not appear to be affected by section 29 (4) of the Settled Land Act, 1925. That sub-section substitutes recording (in the case of documents executed after 1925) for enrolment "in place of the requirements respecting attestation and enrolment prescribed by" section 4 (6) and (9) of the M. & C. U. Act, 1888, whereas the requirement respecting enrolment in cases falling within section 6 of the M. & C. U. Act, 1888, is prescribed by section 6 and not by section 4 of that Act.

### 5. Exemption from Recording.

- (1) Assurances exempted from enrolment by statute: Mortmain and Charitable Uses Act, 1888, s. 8.
- (2) Assurances of land upon trust for various universities and colleges (*ibid.*, section 7 (i)). But see "EDUCATIONAL TRUSTS", Part V below.
- (3) Assurances of land *otherwise than by will* to trustees on behalf of any society or body of persons associated together for religious purposes or for the promotion of education, art, literature, science or other like purposes (Mortmain and Charitable Uses Act, 1888, s. 7 (ii)) *provided* that such assurances comply with the following conditions:—
  - (i) The assurance must be an assurance of land "for the erection thereon of a building for religious purposes or for the promotion of education, art, literature, science or other like purposes or any of those purposes or whereon a building used or intended to be used for such purposes, or any of them, has been erected" (*ibid.*).
  - (ii) The assurance must be made in good faith for full and valuable consideration (*ibid.*).
  - (iii) The land conveyed must not exceed two acres. It appears to be clear that, subject to any requisite

licence in mortmain required by a corporate charity, a charity whether incorporated or not can hold an unlimited number of sites not exceeding two acres each, and that view is held by the Charity Commission, but each assurance must have been for the erection upon the land assured of such a building as mentioned in (i) above or such a building must have been erected on the land at the date of the assurance (*ibid.*).

- (4) Assurances by deed for full and valuable consideration of land (without limit as to quantity) for a schoolhouse for an elementary school (g), or for a public park or public museum : Mortmain and Charitable Uses Act, 1888, s. 6.

But note that by the same section any will containing such an assurance and any assurance by deed by way of gift or for less than full and valuable consideration for such a purpose must be executed not less than twelve months before the death of the testator or conveying party (as the case may be) and must be enrolled in the books of the Charity Commissioners within six months after the testator's death, or in the case of an assurance by deed within six months after the execution of the deed (section 6 (2)). Apparently there is no power to extend the time for enrolment, for section 5 of the Act which confers power to effect enrolment out of time does not apply to cases within section 6. (As to extension of time see Part I above, paragraph 3 A (3) (a).) Moreover, in the case of a gift by will for such a purpose not only must the will be made at least a year before the testator's death and enrolled with the Charity Commissioners within six months after his death, but the quantity of land permitted to be devised by the testator is limited in the case of a public park to twenty acres, in the case of a public museum to two acres, and in the case of a schoolhouse to one acre (section 6 (3)). But as to schoolhouses see footnote (g).

- (5) By section 1 of the Mortmain and Charitable Uses Amendment Act all of the provisions of the last preceding paragraph (4) (except as mentioned later) are to apply to assurances by deed to any local authority for any of the purposes for which such authority is empowered by statute to acquire land. The exception is that where the conveyance is by deed for less than full and valuable consideration it need not be executed twelve months before the death of the conveying party (h).
- (6) Registered dispositions of registered land under the Land Transfer Act, 1875, or the Land Registration Act, 1925 (M. and C. U. Act, 1888, s. 9; S. L. A., 1925, s. 29 (4)).

#### *Practice Note.*

The Charity Commission consider that a separate declaration of trust of registered land (not being a

(g) As to schoolhouses see now s. 117 of the Education Act, 1921, s. 87 of the Education Act, 1944, and "Educational Charities", Part V, below.

(h) But see last footnote. As to present position see "Educational Charities" below.

“registered disposition”) is required to be recorded pursuant to section 29 (4).

- (7) Assurances of land where the charitable trusts are declared by a separate deed. But these are only exempt if the separate deed declaring the trusts has been enrolled (if dated prior to January 1, 1926) or recorded (if dated on or after January 1, 1926) with the Charity Commissioners (or Board of Education), and in either case within six months after the execution of the assurance of the land *subject to extension of time as mentioned below* : M. and C. U. Act, 1888, s. 4 (9); S. L. A., 1925, s. 29 (4).

## 6. Extension of Time.

- (1) As to separate deeds *executed before January 1, 1926*, declaring charitable trusts and requiring enrolment as above mentioned, there does not appear to be any power for the Court or the Charity Commissioners to extend the time except under section 5 of the Mortmain and Charitable Uses Act, 1888, which enables enrolment to be effected out of time where the assurance was made in good faith and for full and valuable consideration, and took effect in possession immediately, possession or enjoyment being held also at the date of the application, the assurance containing no power of revocation, reservation, condition, or provision for the benefit of the grantor or any person claiming under him except as provided by the Mortmain and Charitable Uses Act, 1888, s. 4 (4) and (5) (see above, Part I, paragraph 3 (2)). Enrolment would not of course remedy other defects such as want of attestation by two witnesses. It does not seem that a title defective owing to failure to enrol the requisite document can be validated by “recording” out of time pursuant to section 29 (4) of the S. L. A., 1925 (see below under “*General Remarks*”, paragraph 7, below). However, in many cases a title will have been acquired by prescription as indicated in an earlier part of this section.
- (2) *As to separate deeds of trust executed on or after January 1, 1926.*—By section 119 of the S. L. A., 1925, the provisions of section 4 (6) and (9) and sections 5 and 9 of the M. & C. U. Act, 1888, are repealed as to assurances executed after December 31, 1925. Hence any deed declaring the trusts of an assurance executed after that date will be governed by section 29 (4) of the S. L. A., 1925, and if required to be recorded must be so recorded within six months after the execution of the deed assuring the property to charitable uses (subject to extension of the time as above mentioned). As to the question of recording probates or assents, see “*Wills and Assents*” above. As to separate declarations of trust affecting registered land see the “*Practice Note*” in paragraph 5 (6) above.

## 7. General Remarks.

- (1) In view of the substantial experience which the central body of

the Methodist Church have had in connection with the enrolment and recording of documents with the Charity Commissioners, it is thought that the following statement, taken from a circular issued by that Church, may be of assistance, even though it may be impracticable to furnish conclusive authority for the views expressed.

"The following *should not* be treated as exempt" [from enrolment or recording as the case may be] :—

- "(i) Deeds conveying houses, cottages, shops or other buildings (or land for erection of the same) the income of which is to be applied to a charity. This includes dwelling-houses for ministers' residences.
- (ii) Deeds conveying a ground rent chargeable upon a charitable trust property, to the trustees thereof.
- (iii) Deeds conveying land for burial ground, the income of which is to be devoted to charitable purposes; or conveying land upon which no buildings are to be actually erected.
- (iv) Deeds that convey property virtually given for charitable use, although a full consideration is inserted in the instrument, the sum so inserted, or a larger sum, being contributed in money by the grantor to the charity.
- (v) Deeds that convey for a full and valuable consideration in any other form than by money paid or rent reserved—such as building covenants, exchanges, surrenders of leases, etc."

(2) Although by section 29 (5) it is declared (subject as therein stated) that the section applies to trusts created before or after December 31, 1925, it is also declared by section 29 (4), the sub-section which deals with the substitution of recording for enrolment, that that sub-section shall only apply to instruments executed after December 31, 1925. Hence an assurance executed before January 1, 1926, and which was void for want of two witnesses or failure to enrol cannot be validated by *recording*. On the other hand, section 119 of the S. L. A., 1925, which repeals section 4 (6) and (9) and sections 5 and 9 of the Mortmain and Charitable Uses Act, 1888 (containing requirements as to two witnesses, enrolment within six months, extension of time in cases where the assurance was for full and valuable consideration without power of revocation, etc., and transfers under the Land Transfer Acts) effects that repeal only in respect of assurances executed after December 31, 1925, thus leaving assurances executed on or before that date to be dealt with pursuant to the Mortmain and Charitable Uses Act, 1888, so that in cases to which section 5 of the Mortmain and Charitable Uses Act, 1888, applies (see para. 6 (2) above), enrolment out of time may still be possible. Again, section 119 (1) of the Settled Land Act, 1925, provides that nothing in that repeal shall affect the validity or legality of any dealing in land or other transaction completed before January 1, 1926, or any title or right acquired or appointment made before the same date. It would therefore seem that enrolment would be the appropriate step in the circumstances stated above; but such enrolment can only be effected in the circumstances mentioned in paragraph 6 (1).

#### *Example.*

The following illustration may be of assistance. A deed was executed in September, 1925 (*i.e.*, three months before the S. L. A., 1925,

came into force). It should have been enrolled within six months after its execution, but was not so enrolled. Can such a deed be validated now by enrolment or recording?

The answer is as follows :—

- (i) Recording is not appropriate in respect of any instruments executed before January 1, 1926 (s. 29 (4)).
- (ii) Enrolment is still permissible if enrolment out of time was permissible under section 5 of the Mortmain and Charitable Uses Act, 1888. That section has been repealed only so far as relates to instruments executed after December 31, 1925 (see section 119 of S. L. A., 1925, and Fifth Schedule to that Act).

#### PART IV.

#### *THE OFFICIAL TRUSTEE OF CHARITY LANDS AND THE OFFICIAL TRUSTEES OF CHARITABLE FUNDS.*

Some observations concerning the above mentioned trustees appear to be suitable in an article of this kind for several reasons, of which the following are perhaps the most important.

##### **1. Interests in Land.**

In the case of interests in land all difficulties in connection with title disappear as from the time of the vesting in the Official Trustee of Charity Lands. In normal cases there is no difficulty whatever in obtaining the concurrence of the Board in the vesting of charity land in the Official Trustee. The vesting in the Official Trustee does not, of course, obviate the necessity of deducing the earlier title in connection with any dealing with the property; but as the Official Trustee is a corporation sole with perpetual succession the vesting of the property in new trustees on the occasion of the appointment of new trustees is no longer necessary.

##### **2. Investments other than Land.**

In the case of investments other than land all fear of embezzlement of the trust funds are removed when such funds are vested in the Official Trustees of Charitable Funds. An important point in connection with the payment of dividends is that the dividends on investments held by the Official Trustees are paid without deduction of British income tax from which the income of charitable funds is exempt. The managing trustees are therefore saved the work of reclaiming tax.

Paragraphs 3 and 4 below are, substantially, reproductions of memoranda issued by the Charity Commission.

##### **3. Official Trustee of Charity Lands.**

(1) The Secretary for the time being of the Board of Charity Commissioners for England and Wales is a corporation sole, by the name of "the Official Trustee of Charity Lands", for taking and holding charity lands, and has by that name perpetual succession: Charitable Trusts Amendment Act, 1855, s. 15.

(2) Charity lands (including tenements and hereditaments of any tenure) may be vested in the Official Trustee of Charity Lands by an

Order of any Court or Judge of competent jurisdiction, or by an Order of the Board of Charity Commissioners; and upon the making of such an Order the legal estate in the property which is the subject of the Order vests in the Official Trustee of Charity Lands and his successors without any conveyance or other assurance thereof: Charitable Trusts Act, 1853, ss. 47 and 48; Charitable Trusts Amendment Act, 1855, s. 15; and Charitable Trusts Act, 1860, s. 2.

(3) Where, in pursuance of an Order of the Board, charity lands are conveyed to or vested in the Official Trustee of Charity Lands by any deed or assurance or otherwise, he is authorised to take and hold such lands: Charitable Trusts Act, 1887, s. 5. The words "in pursuance of an Order" should be noted. Apparently a conveyance without a prior Order would not be authorised within the meaning of that section.

(4) The Official Trustee of Charity Lands holds any charity lands vested in him as a bare trustee, "and shall permit the persons acting in the administration of the Charity to have the possession, management, and control of the Trust Estates, and the application of the income thereof, as if the same had been vested in them": Charitable Trusts Act, 1853, s. 50.

(5) The vesting of the legal estate in charity lands in the Official Trustee of Charity Lands in no way prevents or hinders the administering trustees of the charity from exercising any of the rights of ownership over those lands, and accordingly such trustees can, subject to such consents as may by law be required, sell, exchange, partition, mortgage, lease, and otherwise dispose of those lands, as freely as if the lands were not vested in the Official Trustee. All assurances and acts for carrying into effect any such sale, etc., can be executed or done by the administering trustees in accordance with certain prescribed formalities, and it is not necessary, save in exceptional circumstances, for the Official Trustee of Charity Lands to execute or to do any such assurance or act personally. See Charitable Trusts Amendment Act, 1855, ss. 16, 29; Charitable Trusts Act, 1869, ss. 12, 38 and 39.

(6) The advantages to a charity of its lands being vested in the Official Trustee of Charity Lands may be summarised as follows:—

- (a) The title to the lands is simplified, and dealing on the part of the trustees with the lands is thereby rendered less troublesome and expensive.
- (b) When new trustees have to be appointed the expense of vesting the charity lands in the new and continuing trustees is avoided; and in many cases the execution of any deed on the appointment of new trustees is rendered unnecessary, whereby a heavy and recurrent expense is saved to the charity.

In short, all the advantages, in these respects, which flow from the incorporation of the trustees of a charity are obtained by vesting in the Official Trustee of Charity Lands, without any of the attendant disadvantages.

#### **4. The Official Trustees of Charitable Funds.**

(1) The Official Trustees of Charitable Funds, who were incorporated by the Charitable Trusts Act, 1925, were constituted for the

express purpose of holding stocks, shares, securities and moneys subject to charitable trusts: Charitable Trusts Act, 1925.

(2) By the Charitable Trusts Acts provision is made for the transfer or payment to the Official Trustees (pursuant to an Order of the Board) of stocks, shares, securities or moneys in trust for a charity by any person, and especially by trustees or other holders of charitable funds or by the representatives of those persons; persons desirous of discharging any legacy or charge given or made to or for the benefit of any charity are empowered to pay the amount of the legacy or charge to the Official Trustees: Charitable Trusts Act, 1853, s. 51; Charitable Trusts Amendment Act, 1855, s. 22.

(3) A payment or transfer may be made to the Official Trustees under these provisions, in pursuance of an Order of the Charity Commissioners for that purpose, which furnishes, by express statutory provision, a complete indemnity to all companies and persons making a payment or transfer or otherwise acting in obedience to it: C. T. A., 1853, s. 25; C. T. A. A., 1855, s. 27.

(4) The Official Trustees have no power to interfere in the administration of the income, or in the management of any charity, and their duty as regards the dividends and income of the funds standing in their name is confined to remitting such dividends and income, through a banker or otherwise, to or according to the order of the administering trustees of the charity in trust for which the funds are held, for the purpose of being applied by them to the objects of the charity: C. T. A., 1853, s. 52.

(5) The general advantages of vesting charitable funds in the Official Trustees are stated by the Charity Commission to be as follows:—

- (a) A complete statutory indemnity is afforded to the trustees or administrators of a charity.
- (b) The dividends on all securities held by the Official Trustees are remitted without deduction of British income tax, from which the income of charitable funds is, by law, exempt. The administering trustees are thus spared the inconvenience of claiming from the Inland Revenue Department a return of the tax deducted as in the case of dividends on securities which are not held by the Official Trustees.
- (c) The necessity for periodical transfers of stock and other securities upon appointments of new trustees, at a constantly recurring cost to the charity, is obviated.
- (d) Charitable funds held by individual trustees, in course of time frequently become vested, either in a single surviving trustee, or in a personal representative of a surviving trustee, or in some stranger to the trust, or, again, they remain either uninvested or invested in unauthorised securities. All risk to the security or productiveness of trust funds which may thus arise is avoided where funds are vested in the Official Trustees.
- (e) Where, especially on the foundation of a charity, funds are in the hands of persons, whether executors or others, who are not constituted, or do not desire to become the administering trustees of the charity, they can, by vesting the trust fund

in the Official Trustees, not merely relieve themselves of responsibility for its safe keeping but may ensure its due application in conformity with the trusts attaching to it, by applying for trustees to be duly appointed by the Charity Commissioners.

(6) It is obvious that, apart from personal considerations, considerable risk of loss, or of the occurrence of difficulty in tracing the existence of trust funds, arises, both where stock or other securities are held by a single individual or by strangers to the trust, and also, where sums of cash are allowed to remain in private hands uninvested. In these cases the devolution of the fund, on the death of the holder, must, almost certainly, take a course foreign to the trust, and the property of the charity may probably become mixed with, and indistinguishable from, private funds. In any of these cases it will be the duty of the Commissioners, in accordance with the invariable practice of Courts of equity, to take steps to ensure the safe custody of the fund by means of its transfer or payment to the Official Trustees.

## PART V.

### *EDUCATIONAL TRUSTS.*

#### **1. Acquisition and Alienation of Land held upon Educational Trusts.**

Except as mentioned below the provisions set out in Part I of this article concerning the jurisdiction of the Charity Commissioners apply also to educational charitable trusts with the substitution of the Board of Education for the Charity Commissioners; but there are a number of special provisions applicable to educational trusts of various kinds which cannot be set out fully here. The following points may, however, may be mentioned.

The provisions of the Charitable Trusts Acts, 1853 to 1894, which relate to the sale, leasing, and exchange of lands belonging to any charity, extend to the sale, leasing and exchange of the whole or any part of any land or schoolhouse belonging to a local education authority for the purposes of elementary education which may not be required by that authority, but with the substitution of the Board of Education for the Charity Commissioners: section 115 (1) of the Education Act, 1921.

Section 115 (2) contains provisions as to the alienation of land held for the purposes of higher education, and section 116 contains provisions as to the purchase of land for the purpose of an elementary school, and the form of conveyance appropriate to such case.

In relation to schools reference should be made to the School Sites Acts, 1841, 1844, 1849, 1851 and 1852, the School Grants Act, 1855, and the Technical and Industrial Institutions Act, 1892, the last-mentioned Act containing special provisions as to sale and exchange of sites (section 9) and declaring that Parts I and II of the M. & C. U. Act, 1888, and the requirement of the M. & C. U. Act, 1891, as to sale of land given by will shall not apply to sites for institutions within the Act.

## 2. Exemption in respect of Mortmain Requirements.

### (1) *As to Assurances made before April, 1945.*

By section 117 (1) of the Education Act, 1921, assurances within the Mortmain and Charitable Uses Act, 1888, s. 10, of land or personal estate to be laid out in the purchase of land for educational purposes *whether made before or after the passing of that Act* are exempt from any restrictions of the law relating to mortmain and charitable uses, and it is expressly stated that the Mortmain and Charitable Uses Acts, 1888 and 1891, and the Mortmain and Charitable Uses Amendment Act, 1892, are not to apply to any such assurances. The effect of this section (section 117 of the Education Act, 1921) is to free from all mortmain fetters assurances of land upon trust for educational purposes (though *not from fetters upon the disposal thereof or from recording as mentioned below*).

It will have been noted under the heading "Mortmain" that special exemptions were granted both in respect of mortmain prohibitions, and in respect of the contents and form of assurances for (*inter alia*) a schoolhouse for an elementary school (Mortmain and Charitable Uses Act, 1888, s. 6), but that there were special requirements (where the assurance was by will or by deed not reserving full and valuable consideration) under which it was necessary that the will or conveyance should have been made at least a year before the donor's death and enrolled within six months after the death of the testator or the date of the conveyance (as the case might be): *ibid.*, section 6 (2). But section 117 (1) of the Education Act, 1921, applies (as above stated) to assurances of whatsoever date and grants exemption from the whole of the Mortmain and Charitable Uses Acts, 1888 and 1891, and from the Amending Act of 1892. Hence section 6 of the Mortmain and Charitable Uses Act, 1888, must be read as if the last-mentioned requirements of section 6 (2) and all other requirements of the Mortmain and Charitable Uses Acts had no application to assurances of land for such schoolhouses, the only requirements in relation to their acquisition being those mentioned in the next succeeding paragraph 3 concerning the recording of assurances of land for charitable purposes.

### (2) *As to Assurances made on or after April 1, 1945.*

By section 87 (1) of the Education Act, 1944, it is enacted that the M. & C. U. Acts, 1888 and 1891, and the M. & C. U. Amendment Act, 1892 (which impose restrictions upon assurances of land and personal estate to corporations and to charitable uses—see Part I of this article), shall not have effect with respect to any assurances of land or of personal estate to be laid out in the purchase of land if the land or the income thereof is to be used for educational purposes.

It will be observed that the above provision, which replaces section 117 (1) of the Education Act, 1921, is substantially to the same effect, and does not appear to render necessary any change in the statement of the position as set out in sub-clause (a) above.

## 3. Enrolment and Recording.

### (1) *As to Assurances executed before August 19, 1921.*

Reference should be made to Part III of this article so far as

concerns enrolment. The question of recording deeds dated earlier than 1921 does not arise.

(2) *As to Assurances executed after August 18, 1921, and before April 1, 1945.*

Every assurance of land (or personal estate to be laid out in the purchase of land) for educational purposes, including every assurance of land to any local authority for any educational purpose or purposes, is to be sent to the offices of the Board of Education for the purpose of being recorded in its books *as soon as may be* after the execution of the deed or other instrument of assurance, or (in the case of a will) after the death of the testator: Education Act, 1921, s. 117 (2). It is declared by section 29 (4) of the Settled Land Act, 1925, that the requirements of that sub-section as to recording charitable assurances with the Charity Commissioners do not apply to instruments required to be recorded with the Board of Education under section 117 of the Education Act. Accordingly, in the case of assurances taking effect *before April 1, 1945*, the six months period mentioned in section 29 of the S. L. A., 1925, does not apply to assurances of land (or personalty to be laid out in purchase of land) for educational purposes; they are only to be recorded "as soon as may be" (see above).

Section 117 of the Education Act, 1921, applies to public schools: *Re Harrow School*, [1927] 1 Ch. 556.

(3) *As to Assurances executed on or after April 1, 1945.*

(i) FIXED PERIOD FOR RECORDING.

Changes are made by the Education Act, 1944. It is provided by section 87 (2) of that Act that "every assurance of land or of personal estate to be laid out in the purchase of land, including every assurance of land to any local education authority, shall, if the land or the income thereof is to be used for educational purposes, be void unless the assurance or a copy thereof is sent to the Minister [of Education] within six months after the date upon which the assurance takes effect: Provided that the Minister may, either before or after the expiration thereof, extend the period of six months in any particular case, and if the assurance or a copy thereof is sent to the Minister within the extended period, the assurance shall not be void or shall be deemed not to have been avoided, as the case may be".

The wording of the sub-section set out above is by no means happy. First, it is presumed that the draftsman really meant that an assurance recorded within the extended period should have the like validity and effect (if any) as if it had been recorded within the before-mentioned period of six months. It might, for example, be void for other reasons. Secondly, it is at least arguable that the Minister can only grant one period of extension. Unforeseen circumstances may prevent the recording of the document within that period (*e.g.*, the death or illness of a solicitor, clerk or trustee). It should have been made clear that more than one extension could be granted.

In the circumstances it is suggested that an application for an extension of the period should never be made without sending to the Ministry of Education the assurance or a copy of it. This is tanta-

mount to saying that an application for extension should never be made until the six months period has expired. For if the original or copy can be sent within that period there is no point in applying for an extension. On the other hand, if an application is made without sending to the Ministry the original or a copy it is always possible that the original or the only available copy may be lost or destroyed or may not be available for dispatch to the Ministry during the extended period. If that happens it may be impossible to validate the document. That would be the position if it is held that the Minister can only grant one period of extension.

As indicated by the heading of this sub-section the provisions of section 87 (2) apply only to assurances which take effect on or after April 1, 1945. It is enacted by section 87 (5) of the Act that nothing in section 87 (2) is to affect the validity of any assurance which has taken effect before the commencement of Part II of the Act (*i.e.*, April 1, 1945). Presumably assurances executed before April 1, 1945, can still be recorded out of time without any order of the Minister, and the pre-1944 law will apply to such assurances.

#### (ii) WHAT ASSURANCES ARE RECORDABLE.

In this respect there is no difference between assurances which take effect after August 19, 1921, and those taking effect on or after April, 1945. Although section 87 of the 1944 Act does not contain any specific reference to wills as was the case in section 117 of the Education Act, 1921, it is declared by section 87 (4) of the Education Act, 1944, that the expression "assurance" has the meaning assigned to it by section 10 of the Mortmain and Charitable Uses Act, 1888. That section provides that unless the context otherwise requires, "Assurance" includes a gift, conveyance, appointment, lease, transfer, settlement, mortgage, charge, incumbrance, devise, bequest, and every other assurance by deed, will or other instrument". It has been pointed out in paragraph 1 of Part III of this article that the Charity Commissioners take the view that section 29 (4) of the Settled Land Act, 1925 (which requires that assurances to charitable uses (including charitable educational uses) shall be recorded) does not apply to gifts by will. The reason given for this view is as follows. The assurances referred to in section 29 (4) are assurances of land or of personal estate to be laid out in the purchase of land "within the meaning of section 4 of the Mortmain and Charitable Uses Act, 1888". Now, the conditions laid down by section 4 were such that no testamentary gift could be in conformity with them. As Lindley, L.J., said in *Re Hume*, [1895] 1 Ch. 422, at p. 435: "Although the definition clause in section 10 of the Act of 1888 says that assurances include a will, yet when you come to read section 4, which relates to the conditions under which assurances may be made to charitable uses, you will find that wills are expressly excluded by the language of the clause". His Lordship might have omitted the word "expressly" and drawn attention to the fact that wills were only included "in the definition contained in section 10 of the 1888 Act" unless the context otherwise requires and that the context in section 4 did "otherwise require". It will be observed that instruments required by section 117

of the Education Act, 1921, to be recorded with the Board of Education are excluded from the operation of sub-section (4) of section 29 of the Settled Land Act, 1925, by an express provision in the third paragraph of that sub-section, and the Board of Education have never been hampered by a reference to section 4 of the 1888 Act. Accordingly, whether the assurance is dated before or after April 1, 1945, a gift by will or codicil of land or of personal estate to be laid out in the purchase of land executed after the passing of the Education Act, 1921 (August 19, 1921), falls within the 1921 Act or the 1944 Act (as the case may be) if the land is to be held upon educational trusts. It is to be observed that it is immaterial whether the educational purposes are charitable, or even whether "full and valuable consideration" is paid. The requirement of recording extends to *all* assurances of land (or of personal estate to be laid out in the purchase of land) where the land is to be used for educational purposes, if such assurances take effect on or after August 19, 1921, regardless of the question whether they take effect before, on, or after April 1, 1945. In general there should be no great difficulty in deciding whether an assurance is an assurance for educational purposes; but the case of wills and assents presents some difficulty. It has already been pointed out that a will may be such an assurance; but the same may be said of an assent. Should the probate or the assent be recording or should both be registered? I fear that no definite answer can be given. I understand that the Ministry of Education consider that the recording of either document (or a copy of the will) is a sufficient compliance with the statutory provision. It will be recalled, however, that recordable assurances must be recorded within six months after they take effect, and the recording of the will appears to be indicated, particularly as the definition in section 10 (set out above) includes a "devise" which must refer to the "assurance" by the will itself, and the assent may be delayed until after six months from the death of the testator. However, I do not know of any sound reason for suggesting that an assent is not an assurance by an "instrument" within the meaning of the definition in section 10 of the Act; for if there were no written assent there would be no effective assurance to the donee. Possibly both the probate and the assent ought to be recorded; and that would appear to be the only safe course.

### (iii) WHAT IS "LAND" ?

By section 3 of the M. & C. U. Act, 1891, for the purposes of the M. & C. U. Acts, 1888 and 1891, land includes tenements and hereditaments, corporeal or incorporeal, of any tenure, but not money secured on land or other personal estate arising from or connected with land. Thus a mortgage to the trustees or an assurance to the trustees of the benefit of a mortgage, or the proceeds of sale of realty or of leaseholds would not be an "assurance" within section 10 of the M. & C. U. Act, 1888. Thus, if land is settled on trust for sale and educational trusts are declared in respect of the proceeds, such a settlement would not be an assurance within that section.

## (iv) RECORDS.

The Minister of Education is to cause to be kept a record of every assurance which (or a copy of which) is sent to him in compliance with section 87 of the Education Act, 1944 : see section 87 (2) of that Act. There would not appear to be any express provision for the issue of certificates of recording or for searches of records. No doubt, in practice, appropriate facilities will be afforded by the Minister to persons desirous of ascertaining whether an assurance or a copy thereof has been sent to the Minister. Otherwise a purchaser's solicitor might be unable to ascertain whether a recordable assurance was void owing to the failure to comply with the requirements of section 87 as to recording within six months from the date when the assurance took effect or within such extended period as may have been fixed by the Minister pursuant to that section.

## PART VI.

*REGISTERED LAND.*

Very little is to be found in the Land Registration Act, 1925, concerning charities; but the Land Registration Rules contain a number of provisions relating to land subject to charitable trusts.

**1. Statutory Provisions.**

By section 98 of the L. R. A., 1925, it is provided that where an application is made to register a legal estate in land subject to charitable trusts and that estate is vested in the Official Trustee of Charity Lands he shall, notwithstanding that the powers of disposition are vested in the managing trustees or committee, be registered as proprietor thereof. Section 99 of the Act contains certain provisions concerning land belonging to benefices; but it is not proposed here to deal with the very wide subject of ecclesiastical charities.

**2. Persons to be registered as proprietors on first registration.**

In cases where the land cannot be sold without the consent of the Charity Commissioners or the Board of Education the following provisions apply:—

**(1) *Where land vested in Official Trustee of Charity Lands.***

In such cases the Official Trustee is to be registered as proprietor subject to the production of—

- (a) the conveyance or other disposition (if any) of the land for the benefit of the charity and either (i) a conveyance to him together with the original or an official copy of the order of the Court or of the Charity Commissioners authorising him to accept such conveyance, or (ii) an official copy of the Order, Scheme, or other instrument vesting the land in him; or
- (b) evidence that the land has become vested in the Official Trustee under the provisions of a statute, L. R. R. 60, A (1).

The managing trustees (if any) are the persons to apply for the first registration under sections 4 and 8 of the L. R. A., 1925, of the Official Trustee: L. R. R. 60, A.

(2) *Where land vested in a Corporation.*

If the land is vested in a corporation (other than the Official Trustee of Charity Lands) on trust to deal with it in accordance with the directions of the managing trustees then that corporation is to be registered as proprietor: L. R. R. 60, A (2).

(3) *All other cases where there are managing trustees.*

In all other cases where there are managing trustees they are to be registered as the managing trustees for the time being: L. R. R. 60, A (3).

(4) *Where there are no managing trustees.*

If there are no managing trustees and the land is vested in a corporation then such corporation may apply for registration as proprietor: L. R. R. 60, B.

For the purposes of the provisions noted above the term "managing trustee" includes a committee of management: L. R. R. 60, D.

### 3. Restrictions.

(1) *General rule.*

If land is registered in accordance with the above provisions a restriction in Form 12 (see Schedule to Land Registration Rules, 1925) is to be entered in the register (L. R. R. 60, C) subject to the exception mentioned below. The restriction in Form 12 is as follows:

"No disposition or other dealing is to be registered without the consent of the Charity Commissioners [the Board of Education] or an order of the Registrar".

(2) *Exceptions.*

It does not follow that the consent of the Charity Commissioners or of the Board of Education is in fact necessary. In that case:—

- (a) the charity trustees may desire to avail themselves of Rule 62 of the Land Registration Rules which enables the Charity Commissioners or the Board of Education, if satisfied that the land may be sold without their consent, either generally or so long as a particular condition is satisfied, to give a certificate (by order under seal) to that effect. When that is done the Registrar may accept such a certificate as conclusive evidence that a restriction in Form 12 need not be entered, or may be removed or modified, or that a conditional restriction only need be entered: L. R. R. 62;
- (b) the charity trustees may be able to satisfy the Registrar by formal evidence that so long as a certain condition of affairs continues the land may be sold without the consent of the Charity Commissioners (or Board of Education). In that case it would be suitable that a modified form of restriction be entered. Thus, if the property is registered and *bona*

*fide* used as a place of public worship, it will be exempt, as stated in Part II of this article, from the jurisdiction of the Commissioners. Upon production of the certificate of registration, and also of a certificate from a responsible official of the charity that the premises are *bona fide* used as a place of public worship (if the Registrar so requires), it would appear to be in order for the Registrar to enter a restriction in the following form:—

“No disposition or other dealing is to be registered without the consent of the Charity Commissioners [the Board of Education] or an order of the Registrar except a disposition of or dealing with any building registered as a place of meeting for religious worship with the Registrar of Births, Deaths or Marriages in England or Wales, and *bona fide* used as such”.

That exemption is only one of the exemptions mentioned in the Charitable Trusts Act, 1853, s. 62, and there would really seem to be no legal reason why the whole of the exemptions should not be referred to in the restriction in all cases. In that event the exception could presumably be worded somewhat as follows:—

“Except any disposition of or dealing with land or buildings to which the Charitable Trusts Act, 1853, does not extend”.

However, in practice there is a good deal to be said for the mention of specific exemptions only.

Thus—to take another example—exemption may be claimed because the building is alleged to be a vestry connected with a church, or a college or hall of the University of Oxford, or because the charity is a mixed charity and the registered property is one which can be dealt with by the trustees without the consent of the Charity Commissioners. In such cases it is really more satisfactory that a certificate should be obtained from the Charity Commissioners (or Board of Education) pursuant to Rule 62 that the land may be sold without their consent, either generally or so long as a particular condition is observed. The Registrar can then act upon the certificate, and make the necessary entry to that effect. Accordingly a purchaser will not be put to the trouble of verifying the position except in relation to the observance of any condition specified in the entry.

#### 4. Doubtful Cases.

The Registrar may be doubtful whether the land can be sold without the consent of the Charity Commissioners or the Board of Education. In that case where the application is for registration of the land the registration is not to be completed until either—

- (a) such a certificate from the Commissioners or the Board as above mentioned has been produced to the Registrar; or
- (b) notice of the proposal to register the title without the entry of a restriction in Form 12 (see above) has been served by the Registrar on the Attorney-General (L. R. R. 61).

By the same rule it is provided that if after receipt of the notice mentioned in (b) above the Attorney-General enters an objection to the registration of the title without a Form 12 restriction the Registrar shall refer the case for the opinion of the Court.

It seems questionable whether Rule 61 provides a happy solution. Owing to the general desire of charities which are not governed by a scheme to steer as clear of the Charity Commissioners as possible, many cases occur in which it must be reasonably clear to the Registrar that the land is subject to charitable uses, but no information is vouchsafed to the Registrar to enable him to decide whether the land can or cannot be sold without the consent of the Charity Commissioners. It might be thought that the rule should have provided for the registration of the land with a Form 12 restriction pending the (perhaps lengthy) investigation of the question whether such a restriction was appropriate. The words "or an order of the Registrar" would enable the Registrar to remove the restriction as soon as it appeared proper for him to do so. Meanwhile the title of the applicant would be protected—to such an extent as registration does protect registered proprietors.

It would, however, seem from the present writer's experience that the Registrar has in fact taken what may be termed the business view, and has made a practice of entering a Form 12 restriction where land obviously belonging to a charity is registered, leaving the trustees to apply for a certificate under Rule 62 (above) if they desire to have the restriction removed.

#### **5. Official Trustee of Charity Lands.**

The provisions of Rule 60 concerning the first registration of title to charity land have been set out above and it is unnecessary to repeat the provisions of that rule concerning the Official Trustee. It will be recalled that under section 98 of the L. R. A., 1925, where the legal estate in charity land is vested in the Official Trustee he is to be registered as proprietor. That provision would appear to apply whether the land is already registered or the case is one of first registration of the title.

There is also another rule which is concerned with the registration of the Official Trustee. By Rule 128 the Official Trustee may be registered as proprietor of land on behalf of any Charity or Foundation:—

- (a) where the managing trustees of the Charity or Foundation are registered as proprietors of the land—on production of an official copy of an order by a competent authority vesting the land in the Official Trustee;
- (b) where the managing trustees are not so registered—on the production of a transfer to them and an official copy of the order vesting the land in the Official Trustee;
- (c) where the land is vested in the Official Trustee under a statute—on production of such evidence as the Registrar may require that the land is so vested.

A special note is necessary in connection with case (b) above. The policy in connection with the holding of land by the Official Trustee is that he is in no circumstances to be rendered personally liable merely by reason of the holding of a legal estate, and that the managing trustees shall remain the active and effective trustees in connection with the operations of the charity and dealings with the land. The Official Trustee is merely a convenient statutory corpora-

tion for the holding of charity land. Accordingly, the implied covenant on the part of the transferee which arises under section 24 of the L. R. A., 1925, on the transfer of a leasehold interest concerning the payment of the rent and performance of the covenants is to be deemed to have been entered into by the managing trustees in case (b) above, notwithstanding the fact that the transfer to them remains unregistered, and the Official Trustee is registered without a transfer in his favour.

For the purposes of section 20 (which deals with the effect of the registration of dispositions of registered freeholds) section 23 (which deals with the effect of the registration of dispositions of registered leasehold interests) and section 28 (which deals with implied covenants in charges), although the managing trustees are not in fact registered, those sections are to operate as if the managing trustees had in fact been registered as proprietors and as if the Official Trustee were the transferee, L. R. R. 128 (2). And when the Official Trustee is registered as the proprietor of leasehold land he is to have such immunity as is conferred by the Charitable Trusts Acts, 1853—1891, L. R. R. 260. Where the Official Trustee is registered as proprietor of the land it is obviously convenient that the managing trustees should register an address for service. Rule 129 provides that they may do so, and thereupon all notices which are required under the Land Registration Rules to be sent to the registered proprietor are to be sent to the managing trustees. Moreover, where any reference is made to the managing trustees in the register the Registrar may, if he thinks fit, accept a certificate under the seal of the Charity Commissioners or of the Board of Education certifying the present trustees: L. R. R. 130.

## 6. Transfers to and charges in favour of Charities.

### (1) *Evidence and Forms.*

In the case of a transfer to or charge in favour of a corporation of land (whether already registered or not) the Registrar, before registering the corporation as proprietor of the land or charge, may require evidence of incorporation and of the power of the corporation to deal with the land or charge, L. R. R. 259. If the company is registered for profit under the Companies Acts a certified copy of the memorandum and articles of association is required to be furnished, but no further evidence of its power to acquire or dispose of any interest in or charge on land is necessary, unless the Registrar, in any specific case, requires such evidence to be furnished: L. R. R. 259 and cf. 121 (4) (b). The last mentioned exemption will presumably not apply to transfers to charitable corporations incorporated under the Companies Acts: see Part I of this article, paragraph 2 (1), and L. R. R. 122—123.

The provisions of Rule 60 concerning the persons to be registered as first proprietors of land which cannot be sold without the consent of the Charity Commissioners or the Board of Education have been set out in paragraph 2 above, and apply to corporations about to be registered as first proprietors. Those provisions, as read with the Settled Land Act, 1925, s. 29 (2) and (5), should, for convenience

of future dealings, be borne in mind when considering whether an assurance should be taken in the names of individual trustees or of a corporation.

(2) *Land Registry Rules 121—123.*

The above provisions link up with Land Registry Rules 121, 122, 123 (1) which provide as follows:—

(a) TRANSFERS TO CORPORATIONS.

(i) A transfer of land to an incorporated company or other corporation, sole or aggregate, shall be made by an instrument in Form 35, and, save as mentioned in the following proviso, is to refer to the licence in mortmain or statute enabling the corporation to acquire or hold the land: L. R. R. 121 (1).

(ii) If the licence or statute contains any limit to the extent of land which may be acquired (*e.g.*, pursuant to the Companies Act, 1929, s. 14—see Part I of this article, paragraph 2) or any provision as to the purpose for which the land may be used, a statement should be added to the transfer that the land transferred together with any land already acquired or held under such statute does not exceed such limit, and also the purposes for which it is to be used (if such purposes are limited as above mentioned): L. R. R. 121 (2).

(iii) The Registrar may require that such statements be verified by statutory declaration or otherwise: L. R. R. 121 (3).

(iv) By a proviso to the rule now under consideration it is unnecessary to refer to the Companies Acts where the company is incorporated for profit under those Acts, but the memorandum and articles of association must be produced to show that the statutory powers of acquisition and disposition are not affected: L. R. R. 121 (4). In practice a *certified* copy of the memorandum and articles of association is required.

The appropriate form of transfer to a corporation (No. 35) is set out below:—

(Usual Heading)

— day of — 19—

Pursuant to [a licence (*describing it*)] or [the — Act, —] and in consideration of the sum of £— paid to me (the receipt of which sum is hereby acknowledged) I A B (*the registered proprietor*) as [Beneficial Owner] (*or as the case may be*) hereby transfer to — (*fill in the corporate name of the transferee*) the land comprised in the title above referred to

And it is declared by the Transferee [that the land already held by the Transferee under such [licence] or [Act], together with the land hereby transferred, does not exceed — acres] or [that no land other than that hereby transferred is held by the Transferees] and that the present transfer is for the purposes of (*fill in the purposes for which the land is to be used if the relevant licence or statute contains provisions as to the purposes for which the land may be used by the transferee corporation*).

## (b) TRANSFERS FOR CHARITABLE USES GENERALLY.

(i) Observe that the above form is appropriate to corporations generally; but that there are additional provisions in connection with the transfer of land for charitable uses; and the separate form of transfer for charitable uses (No. 36) is set out below. The appropriate additions will appear clearly from that form. It has been thought better not to confuse the two official forms.

(ii) A transfer of land for charitable uses is to be made in Form 36 (see below). Unless the charitable uses are declared by or appear from the instrument of transfer, then that instrument shall refer to the trust deed, will, statute or other separate instrument under which the charitable uses arise, in which case a certified copy thereof must be lodged with the transfer: see L. R. R. 122 (1). Concerning the above provisions see the Practice Note following sub-clause (iii) below.

(iii) Where the transfer is made under a statute or other authority which contains any limit to the extent of land which may be acquired, a statement as required by L. R. R. 121 (2) must be added (see subparagraph (a) (ii) above); and the Registrar may require proof of such statement by statutory declaration or otherwise: L. R. R. 122 (2) and (3).

*Practice Note.*

It may be pointed out that the requirement of section 29 (1) of the Settled Land Act, 1925, that "any conveyance of land held on charitable, ecclesiastical or public trusts shall state that the land is held on such trusts" applies to registered land. It has been mentioned in an earlier part of this article (Part II, paragraph 6, above) that the view of the Charity Commissioners, in accordance with the strict wording of the sub-section, is that it applies only to land *already* held on charitable, ecclesiastical or public trusts, and not to assurances to trustees to the intent that it shall be held by those trustees upon such trusts. There does not appear to be any form prescribed by the Land Registry Rules in connection with transfers of land already held by the registered proprietors upon charitable trusts, though it would seem that such transfers *should* contain the statement that the land is held on charitable trusts. Perhaps it is assumed that the position is sufficiently covered by the rules 60—62 already explained in paragraph 2 above.

With regard to the requirements concerning transfers to trustees upon charitable trusts it must be admitted that the rule is very frequently ignored. If rumour is not, in this connection, a lying jade, trustees for Roman Catholic bodies are, whether the land is registered or unregistered, habitual sinners. But the same is true of many Nonconformist bodies and their trustees. They do but seek one of the many freedoms which are so popular but so difficult to achieve—in this case a species of freedom from bureaucracy—namely, freedom from the jurisdiction of the Commissioners, and presumably from recording in the case of unregistered land. Even where the building is used for religious purposes it does not seem that a purchaser is saddled with notice that it is subject to charitable trusts where it appears to be held beneficially. Moreover, where the property is held

by several individuals the natural assumption is that they are trustees upon trust for sale. Title is readily accepted under a statutory trust for sale nowadays. It is, indeed, safer to accept a title so made, in the case of unregistered land, as the purchaser takes free from equities affecting the beneficial interests in the proceeds of sale. Before the 1925 legislation no doubt the trustees would be compelled either to disclose their trusteeship to the purchaser or to convey as beneficial owners; but since 1925 it appears to be possible to steer clear of that dilemma. I am, however, informed by one who is familiar with the practice of omitting from conveyances and transfers all references to charitable trusts that those who pursue that course do not enjoy that complete freedom from perplexities which is no doubt their goal.

Nevertheless, it appears to be assumed, as a matter of conveyancing practice, that the plea of *bona fide* purchaser for value without notice is available to a purchaser or mortgagee who takes a conveyance or mortgage without notice, that the property is held upon religious or other charitable trusts, and I know of nothing to the contrary. If the property is registered and there is no restriction upon the register it would seem that a purchaser might reasonably accept a transfer by the registered proprietor(s) without inquiring whether the property is held upon charitable, ecclesiastical or public trusts. If that view is incorrect then it would seem that such an inquiry should be made in every case (*i.e.*, should become a standard requisition upon every purchase of registered or unregistered property). In any event, so far as concerns registered land, the Land Registration Act, 1925, s. 74, declares in effect that notice of a trust is not to affect registered dealings, subject to the provisions of that Act concerning settled land. The question of settled land requirements does not arise in the case now under consideration unless the trustees are purporting to act under section 29 of the Settled Land Act, 1925. In that event the problem disappears automatically. Notwithstanding the peculiar perplexities which may beset those who fail to disclose the existence of charitable trusts when acquiring or selling land, I think that the urge to avoid interference or intervention by the Charity Commissioners (or the Board of Education) is so strong that many charitable bodies will continue to transgress in the hope and expectation that what the eye doth not see neither a purchaser nor a mortgagee nor the Charity Commissioners (or Board of Education), nor yet the Chief Registrar of the Land Registry, will grieve after. If and when a penalty is imposed in respect of the failure to insert in assurances to such trustees a statement that the land is to be held by them upon charitable trusts, no doubt the observance of the Land Registry Rules will be more uniform.

(iv) A transfer of land to a corporation or to trustees upon charitable trusts is not to be registered until the Registrar is satisfied that the transfer is in accordance with the law relating to mortmain or charitable uses: L. R. R. 123 (1). The requirements concerning mortmain and charitable uses have been dealt with in the earlier portions of this article, and no further comment upon the above rule appears to be necessary.

(v) When the Registrar is satisfied that the land cannot be sold without the consent of the Charity Commissioners or the Board of

Education he shall enter a restriction in Form 12 with such modifications (if any) as the case may require and he shall think fit. As to Form 12 see paragraph 2 (1) above.

(vi) It may be doubtful, in the Registrar's opinion, whether the land can be sold without the consent of the Charity Commissioners or the Board of Education. In that case the Registrar is to proceed as provided by Rule 61 where a similar doubt arises upon an application for first registration: L. R. R. 123 (3). For the appropriate procedure in such cases see paragraph 3 above.

(vii) It may appear to the Registrar that a right of pre-emption or reverter or restrictive condition or other like right or restriction exists or may arise. In that case he is required to enter a notice of such right or condition, or a restriction or inhibition protecting that right or condition: L. R. R. 123 (4).

A right of reverter may arise, for example, under the School Sites Act, 1841: see *Re Cawston's Conveyance*, [1939] 4 A. E. R. 140; and *Dennis v. Malcolm*, [1934] 1 Ch. 244.

### (c) *Separate declarations of trust.*

Where a charitable trust of land which is already registered is declared by the proprietor it is his duty forthwith and before executing any transfer, charge or other disposition of the land, or dealing with the land in any way, to produce the land certificate and the original or a certified copy of the deed or other declaration of trust to the Registrar, and the Registrar is thereupon required to cause the appropriate restriction (if any) as prescribed by rule 123 as set out in sub-paragraphs (iv) to (vii) above: L. R. R. 124.

### *Practice Note.*

Here again I am afraid that the rule is often ignored or overlooked. No penalty appears to be imposed in respect of the failure to comply with the rule except that by section 29 of the Charitable Trusts Amendment Act, 1855, it is not lawful for the registered proprietors thenceforth to effect sales, mortgages or other dealings as specified in Part II A, paragraph 1, of this article without the requisite authority or approval as therein mentioned. On the other hand, if the registered proprietors effect a dealing without disclosing the existence of the charitable trust it would seem probable that a *bona fide* purchaser for value without notice or charge once registered as the proprietor of the land or charge would be entitled to maintain his position on the register. At the same time, it cannot be said that the point is entirely free from doubt; and, in any event, it is not felt that practitioners or their clients should ignore the provisions of the Land Registry Rules or of section 29 of the Settled Land Act, 1925 (see Part II, paragraph 6 of this article), or prejudice the position of purchasers or chargees or those claiming under them by effecting a disposition which is expressly declared by section 29 of the Charitable Trusts Amendment Act, 1855, to be unlawful.

### **5. Power of majority of trustees.**

It will be recalled that in an earlier part of this article reference was made to the powers of a majority of trustees acting on behalf of

trustees, and the provisions of section 12 of the Charitable Trusts Act, 1869, in that connection: see Part II, paragraph 12. Where that section enables a majority of the trustees or persons acting in the administration of the charity to carry into effect by the necessary documents and acts any disposition of land registered in the name of the trustees or of the Official Trustee of Charity Lands, a transfer or charge for giving effect to such statutory power executed by such majority may be acted upon by the Registrar as if it were executed by all the registered proprietors or by the Official Trustee of Charity Lands where he is the proprietor: L. R. R. 132. The Registrar may require such evidence as he deems sufficient that the case falls within the provisions of the section above mentioned, *ibid*.

#### 6. Execution of transfers.

It is provided by section 29 (5) of the Settled Land Act, 1925, that where any trustees or the majority of any set of trustees have power to create any legal estate (*e.g.*, under section 12 of the Charitable Trusts Act, 1869), that estate is to be transferred or created by them in the names and on behalf of the persons (including the Official Trustee of Charity Lands) in whom the legal estate is vested. That sub-section as read with L. R. R. 132 (above) would appear to permit the trustees or the majority of the *managing* trustees to execute a transfer of land registered in the name of nominees having no powers of management, *where advantage is being taken of section 29 of the Settled Land Act, 1925*, which enables trustees holding land on charitable trusts to exercise the powers conferred by that Act on a tenant for life and the trustees of a settlement. It is material to note that if those powers are exercised, then in cases where the land is vested in the Official Trustee of Charity Lands or in any other persons having no powers of management, the Settled Land Act powers (of a tenant for life and of the trustees of a settlement) are to be exercisable by the managing trustees or committee of management. Those provisions extend to registered land and do not appear to conflict in any way with the Land Registry Rules.

If, however, the trustees do not desire to operate under the powers conferred by section 29 of the Settled Land Act there would appear to be no reason why nominee trustees, having no powers of management, should not execute a transfer or charge in respect of the registered land, subject, of course, to the appropriate and lawful directions of the managing trustees and to any requisite order of the Charity Commissioners or the Board of Education. That view seems to be in conformity with the observations of the Court in *Re Booth*, [1927] 1 Ch. 579.

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## NOTES OF RECENT CASES.

## 1. PROPERTY AND CONVEYANCING CASES.

"Gifts or settlements made in my lifetime"—annuities payable under contracts—testator's "economic source".—*Re Noad*, [1944] 2 A. E. R. 470, is a straightforward case on construction which contains a warning against the application of construction in one branch of law to that in another. A testator directed that death duties payable in respect of any "gifts or settlements made in my lifetime" should be borne out of residue. Subsequently to his will he entered into a deed of dissolution of partnership which required the surviving partners, as part consideration, to pay annuities to his daughters on his death. The question was whether these annuities were gifts or settlements made by the testator though clearly paid by the partners. In *Re Schebsman*, [1944] Ch. 83, the Court of Appeal held that an analogous agreement made by a retiring employee was not a settlement for the purposes of the Bankruptcy Act, 1914, s. 42: "the sums in question were never the property of Mr. Schebsman; he never had any right to them either at law or in equity, and I cannot see how he can be said to have settled them on his wife and daughter": *per* Greene, M.R., at p. 40. On the other hand, Uthwatt, J., at first instance, had described the husband as the "economic source" of the benefits. The Court of Appeal held that in *Re Noad* (*supra*) the expression "settlements or gifts" did include the annuities because to exclude something directly provided though not actually given or settled by the settlor would have been too subtle a view of the meaning of this language. To have interpreted what he had done in accordance with the decision in *Re Schebsman* (*supra*) would not have been the natural way of an ordinary person. X

*Powers—third class of power.*—In *Re Park*, [1932] 1 Ch. 580, Clauson, J. (as he then was) laid down quite definitely that besides general and special powers there could be a third class of power that was valid notwithstanding that it differed from both the other types. In *Re Park* (*supra*) the power was exercisable in favour of any person other than the donee. In *Re Jones*, 61 T. L. R. 120, the matter has come up again in another type of power, namely, a gift to A for life and after A's death to such one or more of the persons living at his death as he shall by will or codicil appoint. This has been held to be a third class of power on the ground that such persons are too wide for a special power and not wide enough for a general power. *Re Park* (*supra*) depended for its peculiarity upon exclusion, but *Re Jones* (*supra*) upon the extent of its inclusion.

Mr. F. E. Farrer (2 K. & E. (14th ed.), p. 1050) expressed the opinion that for the purposes of the perpetuity rule a *Re Park* class of power would be within the perpetuity rule, which is, of course, a matter of the first importance. In so doing he adopted the attitude to be found in *Re Watts*, [1931] 2 Ch. 302, where Bennett, J., held that the perpetuity rule applied to a power which was exercisable only with consent of X on the ground that X was under a duty to exercise some care to scrutinise the proposed dispositions. The learned Judge distinguished *Re Phillips*, [1931] 1 Ch. 347, where a similar power was held to be assets for the pay-

ment of debts on the ground that the trustees whose consent was necessary were not concerned to approve the character of the dispositions.

In *Re Penrose*, [1933] Ch. 793, it was held that a person was "competent to dispose" where he was donee of a power in favour of any issue immediate or remote of his father because he could appoint in favour of himself. This would point to yet another complication of the third class of power. Probably one of the most difficult questions to which they will give rise is whether they have been validly exercised within the Wills Act, 1837, s. 27. The Act applies only to a power "to appoint in any manner he may think proper", and it was held in *Re Byron's Settlement*, [1891] 3 Ch. 474, that a power in favour of anyone other than the donee's present husband or any friend or relative of his was not within the section. It could be argued equally well in *Re Jones (supra)* that this was not within the section, but no doubt the whole subject calls for greater classification. It is submitted that the rules relating to special and general powers may not have the same application to every type of the third class of power.

*Charity—dispensary not a hospital.*—*Re Ford*, 61 T. L. R. 146, needs only a short note to emphasise one of the many difficulties in drawing up wills and other documents relating to charities. A gift of a substantial sum was made to be divided between Birmingham hospitals. The Birmingham Dispensary not unnaturally claimed a share, but it was held with great reluctance by Vaisey, J., that "hospital" was not an apt word to describe "dispensary". The distinction seems to be in the difference between a medical institution that takes in patients and one that does not. We fear that it is this sort of, perhaps inevitable, technicality that brings the law into some disfavour. It is doubted whether a donor to hospitals in shares would wish to omit a very well-known and very valuable medical institution because it differed from the others in not having "in"-patients. There appears to be no way out of this kind of complication but more detailed descriptions.

*Charity—benefit of inhabitants of a locality—"Common Good Fund".*—*Re Baynes* [1944] 2 A. E. R. 579, is another example of what can be regarded as the vexatious variations on the theme of legal "charity". Certain it is that charity in law has little to do with charity in fact and this case has at least the redeeming merit of upholding a truly charitable intent. The gift was to the "Common Good Fund" of a Scottish borough. As reported it does not appear very clearly exactly the extent of the objects of such a fund, but it would seem that from a legal point of view it would be better to describe them as "benevolent" (not charitable) rather than "charitable". Vaisey, J., was able to support the gift on two grounds: (i) That the capital as well as the income could be spent, though in practice it was only the income which was used, and that therefore there was no question of a "perpetuity" and the gift was valid, but the evidence being somewhat thin also held (ii) that the gift was "charitable" because it was a gift for the benefit of persons of a specified locality, and that as long as the property was not simply for public purposes generally but was to be devoted to a limited locality and was for the benefit of the inhabitants it would be charitable, following *Re Smith*, [1932] 1 Ch. 153, where a gift "unto my country England to and for . . . own use absolutely".

*Vendor and purchaser—rescission of contract after decree for specific performance—damages from purchaser in possession.*—*Barber v. Wolfe*, [1945] 1 A. E. R. 399, does not decide anything new, but it is a useful reminder and explains *Harold Wood Brick Co. v. Ferris*, [1935] 2 K. B. 198. A purchaser, having gone into possession and subsequently had a decree for specific performance made against him, declined to pay an occupation rent or damages for breach of contract when the plaintiff obtained an order rescinding the contract in lieu of specific performance. It was held by Romer, J., that on a long line of authority no claim for an occupation rent or damages could be awarded where there was rescission. This applies also when rescission is by notice under the contract: *Hall v. Burnell*, [1911] 2 Ch. 551. On the other hand the plaintiff is entitled to recover the costs of deducing title.

It was argued that the principle so stated was contrary to the decision in *Harold Wood Brick Co. v. Ferris* (*supra*), but the learned Judges of the Court of Appeal in that case had not treated it as one of rescission but as one where one party to the contract had repudiated it and that therefore the other party was entitled to sue for damages for breach as from that date.

(1 K. & E., pp. 327, n. (e), 343, n. (n).)

*Vendor and purchaser—duty of plaintiff on decree for specific performance.*—In *Palmer v. Lark*, 61 T. L. R. 277, Vaisey, J., declined to make an order for specific performance in an unconditional form. He was asked by the vendor plaintiff to make the order in such a form that it would not have been incumbent upon the plaintiff to prove his title and produce an executed conveyance. The learned Judge held that the proper order must include a requirement for the full obligations of the vendor to be performed and could not order the defendant to provide the purchase money without receiving at once the completed title.

*Settlement—direction to accumulate—bonus shares.*—*Re Wright*, 61 T. L. R. 307, primarily is a question of construction on the particular instrument and as such cannot be taken far. The settlement contained a direction to accumulate income in certain circumstances. The trust fund included certain shares of a company in respect of which the company issued bonus shares in place of dividend. Romer, J., held on construction and as a general rule that bonus shares should be treated as part of income for the purposes of accumulation. They were not strictly an accession of capital because they did not increase *proportionately* the holding in the company: *Re Whitfield*, [1920] W. N. 256; *Re Speir*, [1924] 1 Ch. 359.

(2 K. & E., p. 642, n. (p).)

*Settlement—compound settlement—power to vary, etc., leases in first settlement—whether operates as surrender and regrant.*—*Re Arkwright's Settlement*, [1945] 1 A. E. R. 404, was again a question of construction, but turned upon an important issue affecting the right to income and, perhaps, even more importantly it stresses the character of a "compound settlement" under the Settled Land Act. Stated briefly, and therefore incompletely, under a settlement dated 1857, a mining lease was granted in 1882 by the then tenant for life under the powers conferred by the Settled Estates Act, 1877. In 1916 the then tenant in tail barred the entail with the consent of the existing life tenant and resettled the fee

simple subject to the outstanding estates under the old settlement. In 1925 the tenant for life under the 1916 settlement entered into a new agreement with the mining company expressly declared to be supplemental to the existing lease and not by way of surrender and regrant extending the term. The question was whether since 1925 the tenant for life was entitled to the whole income or to three quarters only. Romer, J., held that the tenant for life was entitled to the whole income notwithstanding that the statutory power to vary the terms of a lease was first conferred by the Settled Land Act, 1925, s. 59. The deed, though executed prior to 1926, operated only as a variation and not as a surrender and regrant: *Re Bruce*, [1932] 1 Ch. 316. The fact that the deed was executed prior to 1926 was held to be immaterial because section 59 "does not purport to vest or create new powers of dealing with settled land in a tenant for life" (at p. 413): the section enables to be done in a different form what could be done before: *Re Savile S. E.*, [1931] 2 Ch. 210. It should be added, by way of parenthesis, that none of these cases throws any doubt upon the principle that as between lessor and lessee the deed of variation would operate as a surrender and regrant if an action was brought by the lessee against the lessor. Indeed, they affirm it.

However, it remained material whether the tenant for life enjoyed the rents and profits under the original settlement or whether he was a tenant for life of a mining lease granted under a prior settlement and so entitled to enjoy the whole of the rents and profits. This would be possible only if the rents were paid under a lease granted in priority to the settlement: cf. *Re Fitzwalter*, 112 L. J. Ch. 294. The learned Judge held that the life estate was not held under the original settlement notwithstanding that there was a compound settlement comprising the 1857 and the 1916 settlement for the purposes of the Settled Land Act. "I think it necessarily follows that that is so, because the interest in remainder was completely changed; it was taken out of the settlement altogether and was brought into a new settlement, subject to different limitations and interests, and his life interest was a life interest for that purpose, in my judgment, under the settlement of 1916; and the settlement under which the lease was granted was not the settlement under which the [life tenant's] life interest arose" (at p. 409). Hence he was treated as entitled to the whole of the rents as would have been a common law life tenant who was working opened mines: *Re Hall*, [1916] 2 Ch. 488.

Basically this decision seems to amount to this. A derivative settlement as between the beneficiaries taking under it is a separate settlement, but as to the legal estate forms part of the whole compound settlement. The tenant for life can, "from a conveyancing point of view", dispose of the legal estate and overreach interests under prior settlements, but his beneficial interest does not form part of that settlement. It is not improbable that we may hear more of this point.

(2 K. & E., p. 762 n. (c).)

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*Settled Land Act—trustees—judicial trustee—power to appoint.*—In *Re Marshall's Will Trusts*, [1945] 1 A. E. R. 550, Cohen, J., held that under the Judicial Trustee Act, 1896, s. 1, the Court had power to appoint a judicial trustee for the purposes of the Settled Land Act, 1925. As the Judicial Trustee Act contains no definition of "trust" the learned Judge held that he must give the word its ordinary meaning and for that purpose relied on the definition in *Underhill* (9th ed., p. 3), namely, "A trust is an equitable obligation binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or

*cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation". In the case of the judicial trustee he has the powers and duties of an ordinary trustee but also as judicial trustee and must be so appointed.

In the case under consideration there was no tenant for life so that the trust property would be vested in the trustee of the settlement, but this is not necessarily so. Nevertheless the opinion of the learned Judge must be held to cover all cases under the Settled Land Act. It is thought that in such a case Underhill's definition is hardly adequate.

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*Church services—jurisdiction of the High Court—ecclesiastical law.—Attorney-General v. Dean and Chapter of Ripon Cathedral*, [1945] 1 A. E. R. 479, raises a point which may become of greater importance if suggestions for liturgical alterations are taken more seriously in future, but in any event the decision covers a wider field. Proceedings were brought against the Dean and Chapter on the ground that the substitution of chants for full musical settings of canticles was contrary to the Cathedrals Measure, 1931. The Attorney-General at the relation of the College of Organists applied for a declaration that under the Measure the cathedral must hold "full choral services", meaning full musical settings, and also claimed a mandatory injunction. Uthwatt, J., held that whether or not the services were valid was a question of ecclesiastical law and not general law and, therefore, determination of the question was within the jurisdiction of the ecclesiastical courts. He also held that, if the Court had jurisdiction to make the declaration asked, a point he did not decide, then it also had a discretion to refuse to exercise the jurisdiction, and for a variety of reasons, including the fact that the point only affected Ripon Cathedral and not cathedrals generally, he declined to exercise the jurisdiction. The claim for a mandatory injunction was abandoned at the trial, but as the learned Judge pointed out no such injunction would have issued to compel a series of operations and the services of a cathedral were a singularly inapt subject for such an order.

Incidentally an attempt was made to draw a distinction between a claim for a declaration made by the Attorney-General and that of any other litigant. This the learned Judge declined to accept. Perhaps the greatest interest and importance of the case attaches to the analysis of the position and content of ecclesiastical law. As the learned Judge pointed out (at p. 484): "The temporal courts have a certain jurisdiction in relation to the ecclesiastical courts and, arising out of that jurisdiction, some concern with matters which come before those courts. If an ecclesiastical court decline to exercise jurisdiction vested in it, the temporal court may by mandamus compel the ecclesiastical court to take the case into consideration (see *R. v. Archbishop of Canterbury* (1856), 6 E. & B. 546). If the ecclesiastical court exceeds its jurisdiction, the temporal court may by prohibition restrain the ecclesiastical court. It would also appear that a writ of prohibition may issue where the ecclesiastical court misconstrues an Act of Parliament, though the extent of this jurisdiction may be open to discussion (see *Mackonochie v. Lord Penzance* (1881), 6 App. Cas. 424, at p. 445, and *Phillimore's Ecclesiastical Law*, 2nd ed., vol. 2, p. 1116). The line of demarcation between what is properly only a matter for appeal to a higher ecclesiastical court and matter for prohibition by a temporal court is difficult to draw, but the temporal courts are not courts of appeal from the ecclesiastical courts". And the learned Judge went on to point out that temporal courts are not bound by decisions of the ecclesiastical courts even on a matter of

ecclesiastical law: *Mackonochie v. Penzance* (*supra*), at pp. 431, 447, 460.

In view of a number of Measures affecting the parson's freehold and possibly other matters ecclesiastical it is not impossible that the relation between general and ecclesiastical law may come to the test again. This is the more probable if reform, always regarded as undesirable by some members of a large community, does become part of the Church's programme for a post-war policy.

## 2. WILL CASES.

By J. H. C. MORRIS, B.C.L., M.A., of Gray's Inn, Barrister-at-Law.

*Residuary realty—appointment of residuary legatee—whether realty passes.*—If a testator makes no express gift of residue but merely appoints a residuary legatee, the general rule is that the gift will only include personalty (*Re Gibbs*, [1907] 1 Ch. 465) unless there is a context wide enough to include realty. In *Hughes v. Pritchard* (1877), 6 Ch. D. 24, James, L.J., asked whether any case had ever decided that an appointment of a residuary legatee would not pass undisposed of realty if the testator had made a specific devise. In *Re Bailey*, 61 T. L. R. 256, the testatrix made a specific devise of the house in which she lived, gave some pecuniary legacies and appointed X her residuary legatee. Her net personal estate was worth less than £800 and her undisposed of realty £3,500. The question was whether this undisposed of realty passed to X. Romer, J., following the *dictum* of James, L.J., decided that as the testatrix had made a specific devise, her mind must have turned to real estate, and therefore there was a sufficient context to enable him to hold that the undisposed of real estate passed. The result was clearly in accordance with the testatrix's intention. She obviously did not intend to die intestate as to the greater part of her property. But little weight could be given to this argument without infringing the rule in *Higgins v. Dawson*, [1902] A. C. 1, that evidence as to the state of the testator's property is inadmissible to alter the construction of his will.

It is interesting to recall that in *Perrin v. Morgan*, [1943] A. C. 399, where the testatrix made some specific devises and then gave all moneys of which she died possessed to X, the existence of the specific devises was held to prevent the gift of moneys from passing undisposed of real estate. As Lord Simon said (at p. 413): "The will deals separately with the more important of the freeholds, and this circumstance goes to show that 'all moneys' in this will does not include the omitted freeholds". Hence the same context strikes different Judges in diametrically opposite ways. But the real contest in *Perrin v. Morgan* was not between undisposed of personalty and undisposed of realty but between undisposed of personalty and money in the strict sense: the undisposed of realty was not of much value and it was admitted that it did not pass. A layman would not see much difference between a will devising the testator's house and appointing X residuary legatee, and a will devising the testator's house and giving all his money to X. It is to be hoped that Romer, J.'s more liberal construction will prevail and that the undisposed of realty will be held to pass in both cases.

It is instructive to contrast *Re Bailey* with *Re Hogg*, [1944] 1 R. 244, a case on the other side of the line. The testator "gave devised and bequeathed" a leasehold house and "gave and bequeathed" a number of pecuniary and demonstrative legacies and appointed his sister "residuary legatee", and in the event of her predeceasing him (which did not happen)

appointed her children "residuary legatees and devisees". The will did not specifically dispose of certain perpetual rents in the city of Limerick which were real property. The question was whether these passed to the testator's sister under the residuary gift or were undisposed of. Gavan Duffy, J., held that as the testator had more than once used the expressions "devised" and "bequeathed", and in particular had differentiated between them in the residuary gift itself, it was impossible to hold that the Limerick rents passed. On appeal, the Supreme Court were equally divided and Gavan Duffy, J.'s decision therefore stood. It was true that as the testator spoke of devising and bequeathing a leasehold house, he must have been ignorant of the technical distinction between the two terms. Moreover, if his sister had predeceased him, the substitutionary gift to her children would clearly have passed the Limerick rents, and it was very capricious of the testator to dispose of the rents if his sister predeceased him, but not otherwise. Nevertheless, it is submitted that the decision was correct, though obviously the case is very near the line.

(Theobald 181—182.)

*Annuity—valuation—annuity on protective trusts—valuation as against creditors.*—*Re Rothermere*, [1945] Ch. 72, differs from other recent cases on the valuation of annuities in that the annuitant was a creditor of the estate and not a beneficiary under the will. In 1934 Viscount Rothermere covenanted that he and his personal representatives would pay to the annuitant during the remainder of her life such a sum as after deduction of income tax at the current rate should amount to £62 10s. a month and directed the trustee to hold such monthly sums on protective trusts for her benefit as set out in section 33 of the Trustee Act, 1925. The covenantor died in November, 1940. His creditors began an administration action and in June, 1941, a decree was made for general administration. It was assumed that the estate was insolvent in the sense that the creditors would not be paid in full so that their claims would have to suffer abatement. The annuitant issued a summons to ascertain the proper mode of valuing her annuity. The two main questions were (1) what allowance (if any) ought to be made for the risk of forfeiture, and (2) what rate of income tax ought to be allowed for in calculating the sum needed to produce the tax-free annuity—4s. 6d. in the £, the rate prevailing at the date of the covenant, or 8s. 6d. in the £, the rate prevailing at the date of the death of the covenantor, or 5s. 6d. in the £, the rate to which section 25 (1) of the Finance Act, 1941, had reduced tax-free provisions made before the outbreak of war. The results of applying the different methods of valuation submitted by counsel differed by as much as £16,000.

Vaisey, J., held that the valuation should be calculated with reference to the sum required to purchase an amount of consols sufficient at the covenantor's death to provide by their interest and capital the amount of the annuity during the annuitant's normal expectation of life. The income tax should be calculated at the rate of 8s. 6d. in the £ from the date of the death down to April, 1941, and thence at the reduced rate of 5s. 6d. in the £ substituted (as regards tax-free payments) by the Finance Act, 1941, s. 25 (1). No allowance should be made for the risk of forfeiture under the protective trusts, or for a possible rise or fall in the rate of income tax, or for fluctuations in the price of consols.

In so far as it decides that changes in the rate of taxation between the date of the death and the date of the order must be taken into consideration, the decision is clearly applicable to the valuation of annuities given

by will: *Re Ball*, [1940] 4 A. E. R. 245; *Re Twiss*, [1941] Ch. 141. But if the annuity had been given by will the annuitant would not have been allowed to take a lump sum calculated without any allowance for the risk of forfeiture. The value of the annuity would have been calculated actuarially and held by the trustees on trust for the annuitant until forfeiture: *Re Dempster*, [1915] 1 Ch. 795. Determinable annuities given by will are thus treated differently from those given by deed. Had the persons entitled under the discretionary trusts in *Re Rothermere* been in existence, it is possible that the trustee and not the annuitant would have been allowed to prove for the value of the annuity and the sum paid over to him to hold on the trusts of the deed: see *Re Beecham's Settlement*, [1934] Ch. 183. It is not easy to see why this procedure was not adopted merely because the beneficiaries other than the annuitant had not come into existence. Nor is it easy to reconcile *Re Rothermere* with the distinction drawn by Clauson, J., in *Re Pink*, [1927] 1 Ch. 237. In that case the annuity would cease to be payable if the annuitant used the name of Pink. On the death of the covenantor Clauson, J., held that no more than a nominal reduction should be made because the annuity was determinable during the life of the annuitant, but that a substantial reduction would have been proper if the condition upon which the annuity was made to cease had been the happening of some event beyond the annuitants' control. Clearly the condition of forfeiture in *Re Rothermere* was beyond the control of the annuitant. X

(Theobald 413, 701.)

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*Forfeiture on condition—Jewish faith.*—In *Re Moss*, 172 L. T. 196, a testator who died in 1874 declared that "if any child or grandchild of mine shall intermarry with any person not a member of the Jewish faith" he should forfeit all benefits under the will. One grandchild married a lady who was admittedly not a member of the Jewish faith. Vaisey, J., following *Re Donn*, [1944] Ch. 8, held that the condition was void for uncertainty. Although the House of Lords in *Clayton v. Ramsden*, [1943] A. C. 320, rested their decision on the uncertainty of the phrase "of Jewish parentage", Lords Russell and Romer expressed the opinion that the phrase "of the Jewish faith" is also too uncertain to be valid in a condition, and we now have two decisions that this is so.

(2 K. & E. 858, 882; Theobald 513, 522.) J

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*Gifts by reference.*—In *Re Shelton's Settled Estates*, [1945] Ch. 158, a testator who died in 1898 devised Blackacre (after a life interest to his daughter) "upon the same trusts with the same powers and for the same intents and purposes as" Whiteacre "or as nearly corresponding thereto as the circumstances of the case will admit". Whiteacre had been settled in 1868 on X for life with remainder to the testator for life with remainder to the testator's sons successively in tail male. In 1894, before the death of X later in the same year, the testator's eldest son had disentailed Whiteacre without the consent of X as protector of the settlement, and thereby acquired a base fee. In 1899, after the testator's death, his eldest son enlarged his base fee into a fee simple. On the death of the testator's daughter in 1942 the question arose who was entitled to Blackacre. Four possible views were argued before Vaisey, J.: (1) That the "trusts powers intents and purposes" were to be found in the settlement of 1868 and nowhere else; (2) that they included the one relevant disposition of Whiteacre which had taken place

before the testator's death, namely, the disentailing deed of 1894; (3) that they included the enlargement of the base fee into a fee simple after the testator's death, but in the lifetime of his daughter; (4) that as a base fee cannot be created by will, the attempted disposition of Blackacre failed and Blackacre fell into the testator's residue. Vaisey, J., decided that (2) was the right construction. The case vividly illustrates the danger of devising property by reference to the trusts of other property. As the learned Judge pointed out, the situation would have been even more confused if Whiteacre had been split up and one part had gone in one direction and another part in another.

(2 K. & E. 962; Theobald 607.) ✕

*General power of appointment—exercise of special power as contrary intention to exercise.*—Section 27 of the Wills Act, 1837, provides that a residuary devise or bequest shall be construed to include property over which the testator had a general power of appointment unless a contrary intention shall appear by the will. In *Re Box's Settlement*, 61 T. L. R. 286, the question was whether the will showed a contrary intention. Under a settlement made by himself the testator had a special power to appoint a life interest in favour of any wife who might survive him, and subject thereto a general power. By will made in contemplation of his marriage to X, whom he afterwards married, he gave all his own property to X absolutely and appointed the capital and income of the settled funds to X absolutely if he was unmarried at the date of his death or the income thereof to X for life if the marriage should have taken place. If X predeceased him unmarried he gave all his own property and exercised his general power in favour of Guy's Hospital. X survived the testator and claimed that he had exercised the general power in her favour. Against her two circumstances were relied on as showing a contrary intention: (1) the fact that the testator had exercised his special power in X's favour; (2) the fact that he had distinguished between his own property and the settled funds. It has been held that neither of these circumstances by itself is sufficient to indicate a contrary intention: *Re Stokes*, [1922] 2 Ch. 406; *Re Elen* (1893), 68 L. T. 816. Cohen, J., held that taken together they were not strong enough to do so. The testator intended to exercise the power in every event and only refrained from doing so expressly because he had not contemplated the event which happened, his predeceasing his wife and leaving no issue. Fortunately, section 27 of the Wills Act supplied the gap in the testator's dispositions.

(2 K. & E. 872; Theobald 208, 209.)

### 3. LANDLORD AND TENANT CASES.

By LIONEL A. BLUNDELL, LL.M., Barrister-at-Law.

*Covenant that named person shall not be interested in conduct of business or have any interest in surety company—covenant running with land.*—*Lewin v. American and Colonial Distributors* (1945), 61 T. L. R. 314, raised an interesting question regarding covenants running with the land as between landlord and tenant.

In the lease the lessee covenanted that a certain named person "S" should not have any interest in the lease, should not be entitled to any

interest in any shareholding or loan capital of American and Colonial Distributors, Ltd. (this company being party to the lease in the capacity of surety), should not be a director or concerned in the business of that company, should not be in any way concerned in the conduct of the business carried on upon the demised premises (which was the business of licensed victuallers) and should not become an assignee or sub-lessee of the demised premises or any part of them. There was a proviso for re-entry upon breach of any covenant on the lessee's part. The lessee with consent of the lessor assigned his lease to the surety company.

In fact "S" owned shares in and financed the company, kept his own wines and spirits on the premises and sold them in the restaurant, and was constantly at the restaurant giving orders to employees of the company. The manager of the restaurant was appointed by "S" on behalf of the company. It was admitted that these acts constituted breaches of the covenant, but the defendant company contended that the covenant entered into by the original lessee was collateral to the subject-matter of the lease and so did not run with the land.

Vaisey, J., in a careful judgment which was affirmed by the Court of Appeal, examined the authorities and found that the covenant did run with the land. The first point to be determined was the rule regarding the running of *conditions* (as distinct from *covenants*) with the land. Citing *Stevens v. Copp* (1868), L. R. 4 Ex. 20, *Horsey Estate v. Steiger*, [1899] 2 Q. B. 79 (per Lord Russell of Killowen, at p. 88), and the text-books on this point, Vaisey, J., found the law to be that a condition of re-entry in a lease runs with the land only in so far as the covenants are of a character which runs with the land. Thus, although the original lessee may, by a suitably worded proviso for re-entry, be made to suffer a forfeiture for breach of *any* covenant in a lease, whether that covenant be one that runs with the land or not, an assignee of the term can only be made to suffer a forfeiture for breach of a covenant that runs with the land.

Now a covenant, in order to run with the land, must "touch and concern the thing demised, that is to say, have reference to the subject-matter of the lease. Examples of covenants which have been held to touch and concern the thing demised, so as to run with the land, are covenants not to reside on the demised premises (*Tatem v. Chaplin* (1793), 2 Hy. Bl. 133), "tied house" clauses (*Clegg v. Hands* (1890), 44 Ch. D. 503; *White v. Southend Hotel Co.*, [1897] 1 Ch. 767), and a covenant to pay and maintain a housekeeper to help the tenants of a block of flats (*Barnes v. City of London Real Property Co.*, [1918] 2 Ch. 18). Reviewing these and other authorities, Vaisey, J., came to the conclusion that the covenant in the present case was one that ran with the land. It was a covenant that directly related to the demised premises and to how the lessee was to carry on business there. Earlier provisions in the lease provided for the user of the property for the business of licensed victuallers and the maintenance of the licences; this covenant was a further restriction prohibiting certain things in relation to the carrying on of that business—the business was to be carried on but "S" was not to be concerned in the carrying on of it.

The learned Judge accordingly held that the covenant was one which ran with the land, and this decision was upheld by the Court of Appeal. Scott, L.J., in a judgment in which Morton, L.J., and Cohen, J., concurred, stated the proposition in this form: "Where premises are let for business occupation, the way in which the premises are used is an essential matter and the value of the premises depends on it; and any covenant relating to the conduct of the business on the premises which affects the value of the premises is a covenant which runs with the land".

A subsidiary point which did not arise in view of the finding that this

covenant ran with the land, but was mentioned by Vaisey, J., was the question whether an assignee who happened to be party to the actual lease (it will be remembered that the assignee company was the lessee's surety in this case) could claim that it was not bound by a covenant on the ground that it was not one that ran with the land, even in the case of a covenant of a kind not ordinarily binding upon an assignee.

(Woodfall, 24th ed., p. 558.)

*Small Tenements Recovery Act, 1838*—"agent" for purpose of serving notice.—The Small Tenements Recovery Act, 1838, which provides a summary method for the recovery of possession of small tenements, stipulates as a condition precedent which must be satisfied before the justices may issue a warrant for possession that the landlord or his agent shall have caused the person neglecting or refusing to give up possession to be served with a written notice, signed by the landlord or his agent, of his intention to proceed to recover possession (section 1). By section 7 the word "'agent' shall be taken to signify any person usually employed by the landlord in the letting of the premises or in the collection of the rents thereof, or specially authorised to act in the particular matter by writing under the hand of such landlord".

In *Bailey v. Hookway* (1945), 61 T. L. R. 239, the notice under the above section was served by the landlord's solicitors. These solicitors were not usually, nor had they in fact ever been, employed by the landlord in letting the premises or in the collection of the rents thereof, and they had not been specially authorised to act in the matter by writing under the hand of the landlord. Nevertheless, the justices had held the solicitors to be "agents" within the section. It had been previously held, in *R. v. Hopkins* (1900), 64 J. P., at p. 454, that the question whether a person is an "agent" within this section is a question of fact, but there was no judicial decision as to whether the definition given in the Act was an exclusive definition or not. It has now been decided by the Court of Appeal in *Bailey v. Hookway* that the expression "shall be taken to signify" in the definition of "agent" signifies those classes of persons mentioned and no one else. Accordingly the solicitors were not agents within the section and there was no evidence upon which the justices were entitled to come to the conclusion that the requirements of the Act had been complied with. A landlord who wishes to avail himself of the special remedy provided by the Act must bring himself strictly within its terms and those terms provide, *inter alia*, for service of the special notice required by the landlord himself or by one of the limited class of agents described in the Act.

(Woodfall, 24th ed., p. 1116.)

*Construction of lease*.—A point of construction settled in *Lee v. Tennens* (1945), 61 T. L. R. 340, may be noted briefly. The habendum in the lease was in the words—"To hold the said premises from December 25, 1942, either (a) for the period of two years, or (b) until the actual cessation of hostilities between this country and Germany and for six months thereafter whichever period shall be the shorter". Cassels, J., held that the "six months thereafter" applied only to (b), so that, the period of two years having proved the shorter, the lease came to an end when those two years expired.

(Woodfall, 24th ed., p. 218.)

*Rent Restrictions Acts*—"tenant"—whether 'statutory tenancy can extend to a succession of descendants.—The case of *Summers v. Donohue* (1945), 61 T. L. R. 352, was an attempt to get the decision in *Pain v. Cobb* (1931), 146 L. T. 12, overruled by the Court of Appeal.

By section 12 (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, the expression "tenant" includes the widow of a tenant who was residing with him at the time of his death, or, where a tenant leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court.

In *Summers v. Donohue* the tenant had become a statutory tenant by virtue of holding over after a notice to quit. In 1927 the tenant died and his widow continued in possession as "tenant" by virtue of the above definition. In 1944 the widow died and her daughter, who had been residing in the house, claimed to hold over as statutory tenant. It was held by the Court of Appeal, affirming the decision of the Divisional Court in *Pain v. Cobb*, that the above definition provides two alternative extensions of the expression "tenant" and that the tenant referred to the last time that word is used is the original contractual or statutory tenant referred to in inverted commas at the commencement of the definition. Thus there can only be one extension of the meaning of "tenant" in any particular case, and not a succession of descendants all comprised within the term "tenant". Once the widow has succeeded as tenant, the tenancy is extinguished on her death (assuming it still to retain the character of statutory tenancy) and no member of her family can claim to hold over.

It is important to note that we are only considering here the descent of a statutory tenancy by force of the statute to a widow or member of the family, and not the vesting of a contractual tenancy in the personal representative, which is another matter altogether. In this case, in order to show that what the original tenant held at the time of his death was a statutory tenancy and that there had been no renewed grant of a contractual agency, reliance was placed upon a notice to quit alleged to have been served in 1920. The evidence as to this was not at all clear, but the due service of such a notice was inferred by the County Court Judge in view of the increase of rent which was made about that time to bring up the rent to the maximum permitted under the Act of 1920. It will be remembered that by section 3 (2) of the Act of 1920 no such increase is recoverable unless a valid notice of increase is served in the correct form, and by section 1 of the Rent Restrictions (Notices of Increase) Act, 1923, a notice of increase duly served in correct form (whether before or after the passing of that Act) operates as a notice to quit. This seems to be an application of the maxim *omnia rite et solemniter acta esse* and, for cases where the increased rent has been paid without challenge over a very long period of time, provides an English authority for the principle of assuming the due service of a notice of increase, a principle supported hitherto only by the Scottish case of *M'Kellar v. M'Master*, [1926] S. C. 754.

(Rent Restrictions Guide, pp. 11, 39.)

*Rent Restrictions Acts*—house let in flats in 1939 subsequently let as a whole—standard rent.—In *Vaughan v. Shaw* (1945), 61 T. L. R. 361, a house subject to control under the Rent Restrictions Act of 1939 had been let in two flats in 1939, one at 17s. a week and the other at 15s. 6d. a week. In 1941 the landlord let the house as a whole for the first time to a new tenant at a rent of 25s. a week. The County Court Judge had

fixed the standard rent at 32s. 6d., the sum of the rents of the two flats, but the Court of Appeal held that this was wrong.

The standard rent is the rent at which "the" dwelling-house was let on September 1, 1939, or, where it was neither let on that date nor ever prior to that date, the rent at which it was first let (Act of 1920, s. 12 (1), as applied by Act of 1939, s. 3, and First Schedule). "Dwelling-house" is defined in section 16 of the Act of 1933 as meaning a house let as a separate dwelling or a part of a house being a part so let. This definition is carried into the Act of 1939 by section 7 (1) of that Act. The Court of Appeal accordingly held that the house now under consideration, namely, the entire house let as a whole, was not let as a separate dwelling in 1939 but was first let as a separate dwelling in 1941. That letting in 1941 therefore fixed the standard rent of the house as a whole, and the standard rent was not to be determined by aggregating the separate rents of the two flats which were actually let in 1939.

This decision is in accordance with *Veale v. Cabezas*, [1921] W. N. 311, a case in the Divisional Court raising a similar point under the Act of 1920.

(Rent Restrictions Guide, p. 31.)

*Rent Restrictions Acts*—agricultural land "let together with" a dwelling-house—not necessarily let by the same instrument or at the same time.—By section 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, any land or premises let together with a dwelling-house is treated as part of the dwelling-house, unless the land or premises so let consists or consist of agricultural land exceeding two acres in extent; save as aforesaid, the Acts do not, by virtue of this section, apply to any dwelling-house let together with land other than the site of the dwelling-house. The effect of this section is that a house which would otherwise be within the Acts is taken out of the Acts if it is let with agricultural land exceeding two acres in extent.

In *Mann v. Merrill* (1945), 61 T. L. R. 355, a dwelling-house of a rateable value less than £75 was let in 1938, the only land let with it at that time being the garden and orchard attached. This letting was by a formal lease. In 1939 the landlord, by an informal agreement partly in letters and partly oral, let to the same tenant an adjoining piece of land 3½ acres in extent, which was admitted to be agricultural land. The tenancy of this piece of land was to run concurrently with the tenancy of the house. The tenant contended, at the expiration of his lease, that he was protected by the Rent Restrictions Acts, on the ground that the agricultural land was not let "together with" the house unless it was let at the same time and by the same instrument.

This argument was rejected by the Court of Appeal, who held that the words "let together with" referred to the status of the house and land at the moment when their position came up for consideration by the Court. If in fact they were at that moment together let to the same tenant, it was immaterial that they had come to be so let by independent lettings at different times.

(Rent Restrictions Guide, p. 8.)

## 4. INCOME TAX CASES:

By LEONARD STEIN, Barrister-at-Law.

[The cases selected for notice are not necessarily the most important from the standpoint of the income tax practitioner, but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

*Income tax—capitalisation of mortgage interest—Income Tax Act, 1918, All Schedules Rules, Rule 21.*—The decision of the Court of Appeal in *C. I. R. v. Oswald (Cosier's Settlement Trustee)* (see *The Conveyancer*, volume 8, p. 184) has been reversed by the House of Lords, *C. I. R. v. Lawrence Graham & Co.*, [1937] 2 K. B. 179; 21 T. C. 158 being overruled (1945), 61 T. L. R. 370. The point, shortly put, was whether a rule 21 assessment can be made in respect of the amount representing interest in a lump sum payment in discharge of a debt, where unpaid interest has been capitalised and added to the principal. In *Lawrence Graham's Case*, above, where the amount capitalised as unpaid interest was the net amount of mortgage interest due after deduction of tax, it was held by the Court of Appeal that payment under deduction of tax must be considered to have taken place at the moment of capitalisation, so that when the debt was ultimately discharged by the payment of an amount representing the principal sum plus capitalised interest, there was no payment of interest in respect of which a rule 21 assessment could be competent. The question raised in *Oswald's Case*, above, was substantially the same. In holding unanimously that *Lawrence Graham's Case* was wrongly decided and that the decision of the Court of Appeal in *Oswald's Case* must be reversed, the House of Lords based itself upon the simple proposition that the interest was not paid when it was capitalised but was capitalised because it was not paid. It was on this principle that the House of Lords decided *Paton v. C. I. R.* (1938), 21 T. C. 26, where the interest in question was interest on a bank loan. The same principle ought—it was held—to be applied where, as here, the interest was interest on a mortgage debt. The debt for interest was not discharged by capitalisation; all that really happened was that the security for payment was improved and the debtor assumed an additional burden by becoming liable for interest on the interest overdue. By being capitalised the interest did not lose its quality of interest. Hence, to the extent to which an amount representing capitalised interest formed part of the payment ultimately made by the debtor in settlement of the creditor's claim, there was a payment of interest in respect of which a rule 21 assessment could properly be made in a case in which the payment was not out of taxed income.

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*Income tax—bequest of life interest in property—supplementary payments from capital—payments before residue ascertained—Income Tax Act, 1918, All Schedules Rules, Rule 21—Finance Act, 1938, s. 30.*—In *Cunard's Trustees v. C. I. R.* and *McPheeters v. C. I. R.*, [1945] Tax Rep. 119, a testatrix who died on January 24, 1935, had devised a house to trustees upon trust to permit X to live there rent free during her life. X was also given a life interest in the testatrix's residuary estate. The will further provided that if the income of the residuary estate should be insufficient to enable X to live in the house in the same degree of comfort as she had enjoyed during the life of the testatrix, the trustees should have power to apply such part of the capital as they should think fit "by way of addition to the income; moreover, any capital so applied shall not be replaced out of income of a subsequent year but shall be treated as an additional bequest. . . ." The first question which arose was whether

such payments out of capital as had, in fact, been made by the trustees in exercise of the above-mentioned power were assessable to income tax upon the trustees under rule 21. Some of these payments had been made before, and some had been made after, the completion of the administration of the estate on February 7, 1940. As regards payments made after that date, Macnaghten, J., had no hesitation in holding, on the authority of *Brodie's Trustees v. C. I. R.* (1933), 17 T. C. 432, and *Lindus and Hortin v. C. I. R.* (1933), 17 T. C. 449, that the supplementary payments out of capital must be treated as income of the beneficiary and accordingly gave rise to an assessment upon the trustees under rule 21. Different considerations arose with regard to the payments made before the completion of the administration and the ascertainment of the residue. With regard to these payments, it was held that the case was covered by the decision in *Corbett v. C. I. R.* (1937), 21 T. C. 449, where the Court of Appeal, applying the principles propounded in *R. v. Special Commissioners, ex p. Dr. Barnardo's Homes* (1921), 7 T. C. 646, held that payments made before the ascertainment of the residue to a person entitled to a life interest in a testator's residuary estate were not income of that person and did not attract income tax. It was contended, on behalf of the Crown, that the plea based upon *Corbett's Case*, above, was defeated by section 30 of the Finance Act, 1938, the effect of which is that where, in the period between the death of a deceased person and the completion of the administration of his estate, a person having a limited interest in the residue has received a payment in respect of that interest, that payment is to be deemed, for income tax purposes, to have been received by that person as income. This contention was rejected by the learned Judge on the ground that the Act spoke of a sum paid "in respect of" the limited interest, and a sum paid as an addition to the income bequeathed by the will could not be said to be a sum paid "in respect of" that income.

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*Income tax—interest awarded by Court to successful plaintiff—Law Reform (Miscellaneous Provisions) Act, 1934, s. 3—Income Tax Act, 1918, All Schedules Rules, Rule 21.*—By section 3 (1) of the Law Reform (Miscellaneous Provisions) Act, 1934, in an action for the recovery of a debt or damages a Court of record "may . . . order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit. . . ." Where, in an action for the recovery of a debt, interest is awarded by the Court, under the above-mentioned provisions, to the successful plaintiff, is there a payment of interest from which tax is deductible under the relevant provisions of the Income Tax Acts? This was the question considered, and answered by Evershed, J., in the affirmative, in *Westminster Bank v. Riches*, [1945] 1 A. E. R. 466. The facts were simple. Under a contract between A and B, A was entitled to a half-share of the profit arising from a sale by B of certain securities. A had been induced by B's misrepresentations as to the amount of the profit to accept less than the sum due to him under the contract. B having died, A successfully sued the bank, as B's judicial trustee, for an account. Judgment was given in A's favour for the balance owing to him, and interest was awarded to him by the Court in exercise of its powers under the Act of 1934. In making payment to A, the bank deducted tax from the amount included under the head of interest, and, A having insisted upon payment in full, the bank brought an action for a declaration that tax was deductible. The bank's main contention was that what was referred to in the Act of 1934 as "interest" was, in truth, of the nature of damages and accordingly did not constitute interest of money in the income tax sense. Numerous authorities were cited for the proposition

that, when interest was awarded by the Court in such circumstances, it was awarded by way of damages. The learned Judge pointed out, however, that that proposition, however well established, did not necessarily lead to the inference sought to be drawn from it. Because interest was awarded by way of damages, it did not follow that it lost its quality of interest and became something else, so as to enjoy immunity from income tax. If it did, a person who was compensated by the detention of his money by an award of interest at the rate of (say) 4 or 5 per cent. would receive too much, for had the money been in his hands all along, he would have been taxable on the income arising from it. The learned Judge agreed that in the judgment of Wright, J., in *Re National Bank of Wales*, [1899] 2 Ch. 629, there were observations which might be interpreted as laying it down as a general proposition that where interest is awarded as compensation for the detention of money against a defendant guilty of fraud or other wrongdoing, such interest is not taxable. His comment was that this view—if it was, indeed, the view taken by Wright, J.—was, in his opinion, inconsistent with the reasoning underlying the decision of the Court of Appeal in *C. I. R. v. Barnato* (1936), 20 T. C. 455, and that he was not prepared to be guided by it. In the absence of any binding authority to the contrary, he could see no reason why, in a case in which “interest” was awarded on a money claim under section 3 of the Act of 1934, the word “interest” should be construed otherwise than in accordance with its ordinary meaning.

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*Surtax—absolute gift of shares to infant children—Finance Act, 1936, s. 21.*—In *Copeman v. Coleman* (1939), 22 T. C. 594, where a father had caused shares in a company in which he was interested to be allotted to his infant children, it was held that the transaction amounted to a “settlement” within the meaning of section 21 of the Finance Act, 1936, which, in sub-section (9) (b), defines a “settlement” as including “any disposition, trust, covenant, agreement, arrangement or transfer of assets”. It was accordingly held that the dividends fell to be treated as income of the father and not of the children. A similar question arose, and was similarly decided, in *Hood Barrs v. C. I. R.*, [1945] 1 A. E. R. 500.

In that case there had been a transfer of shares by a father to his infant daughters. It has been sought to create the impression that the daughters’ benefactor was not the father, but his sister. He had, in fact, gone through the form of selling the shares to his sister for cash, but the money which passed was found to have been money provided by him for the purpose. If, then, there was a “settlement” within the meaning of section 21 of the Finance Act, 1936, the father was plainly the settlor. But did the transaction amount to a “settlement”? There had unquestionably been a transfer of assets, but it was contended, on the authority of *Chamberlain v. C. I. R.* (1944), 25 T. C. 317, that an absolute gift was too remote from even the broadest conception of a settlement to be capable of being brought within the scope of the statute. In *Chamberlain’s Case*, which arose out of section 38 of the Finance Act, 1938, it was laid down that “a settlement or arrangement, to come within the statute, must still be of the type which the language of the section contemplates. The settlement or arrangement must be one whereby the settlor changes certain property of his with rights in favour of others. . . .” But whatever may be supposed to be the type of “settlement” contemplated by the language of the 1938 Act, the type of “settlement” contemplated by the language of the 1936 Act is different, for, in defining the expression “settlement”, the 1936 Act, unlike the 1938 Act, includes an express

reference to transfers of assets. This was the short answer to the contention founded upon *Chamberlain's Case*. As Wrottesley, J., tersely put it, "the plain words are enough".

*Income tax—Schedule A—maintenance claim—urban properties—whether "managed as one estate"*—*Income Tax Act, 1918, Schedule A, No. V, Rule 8.*—In order to support a maintenance claim under Rule 8 of No. V of Schedule A the property owner must show that, on the average figures for the five years preceding the year to which the claim relates, the cost of maintenance, repairs, insurance and management exceeded, in the case of land, one-eighth of the annual value and, in the case of houses, the amount of the repairs allowance. Paragraph (4) of the rule requires the calculation to be made by reference to the aggregate figures for "any land managed as one estate or . . . any houses on any such land". In *Scottish Heritable Trust v. C. I. R.*, Tax Leaflet 1323, a maintenance claim was made by a company owning a number of tenements in various parts of Glasgow. For management purposes the property was divided up among a number of agents. The division was not on a topographical basis, and it might well happen that the same agent would be dealing with holdings in widely separated parts of the city. Nevertheless, the Revenue authorities insisted that the maintenance claim must be made, not (as the company contended) by reference to the figures relating to blocks of buildings included in a single Schedule A assessment, but on the footing that the various buildings on the list of a particular agent must be treated as property "managed as one estate". This view found favour with the Appeal Commissioners but was decisively rejected, on appeal, by the Court of Session. The leading judgment was delivered by Lord Carmont, who emphatically expressed the opinion that "one cannot say that in purely urban areas the administration of separate tenements by house factors has any element of unity of estate".

## 5. DEATH DUTY CASES.

*Estate and Succession Duties—property situate abroad—Finance Act, 1894, s. 2 (2).*—By section 2 (2) of the Finance Act, 1894, liability to estate duty in respect of property situate abroad was limited to cases in which there was a liability to Legacy or Succession Duty. By section 24 of the Finance Act, 1936, the extent of the exemption was drastically cut down, but, where certain conditions are satisfied, immunity from estate duty in respect of property situate abroad can still be claimed if, in respect of that property, there is no liability to Legacy or Succession Duty. The tests to be applied in determining whether a liability to Succession Duty exists were considered by the Court of Appeal in *Duke of Westminster v. Att.-Gen.* (No. 1), [1945] Ch. 78. The appeal related to a claim to Estate Duty in respect of property comprised in a marriage settlement executed in New York by the wife's father on a marriage between an English husband and an American wife. The settled property was and had always been locally situate in the United States. On the other hand, the matrimonial home was and was always intended to be in England; the settlement was in English form; and certain of its provisions were framed in language which clearly assumed the applicability of English law—e.g., a reference to "the statutory power of appointing a new trustee". It was clearly laid down by the Court of Appeal that the correct test is whether

the proper law of the settlement is the law of England, and not—as has sometimes been suggested—whether the forum for proceedings under the settlement is an English forum. In other words, the real question is: What is the law under which title is claimed? In propounding this principle, the Court reviewed the authorities, starting with *Wallace v. Att.-Gen.* (1865), L. R. 1 Ch. 1, and made some critical comments on the judgment of Sir George Jessel, M.R., in *Re Cigala's Settlement Trusts* (1878), 7 Ch. D. 351. It was further held that, for the purpose of determining, in this context, what is the proper law of a settlement, all such evidence of the circumstances is admissible as is generally admissible for the purpose of construing a written contract, but the Court cannot listen to direct evidence as to the actual intention of the parties. Taking all the relevant considerations into account, and laying special stress upon the fact of the matrimonial domicile being English, the Court had no difficulty in reaching the conclusion that the proper law of the settlement was the law of England and that accordingly Succession Duty—and, therefore, Estate Duty—was exigible.

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*Estate Duty—lands and chattels inalienably settled by Act of Parliament—Finance Act, 1894, s. 5 (5).*—The decision of Vaisey, J., in *Duke of Marlborough v. Att.-Gen.* (see *The Conveyancer*, vol. 8, p. 238) has been affirmed by the Court of Appeal, [1945] 1 Ch. 145.

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## CORRESPONDENCE.

Form 6, p. 274.

We print a further letter that seems to call for no comment as it is self explanatory:—

THE EDITOR.

DEAR SIR,

With reference to the correspondence on page 149, we appreciate that your intention is that it should be closed, and we do not wish to reopen it, but we do suggest that a warning should be given to subscribers as to requirements under Defence Finance Regulations. Your contributor deals with the question of mortgages, and if we may say so, we think he deals with them rightly, but in private companies it is very frequent for directors, who are satisfied with the position, to lend money on terms which do not involve mortgages, but which may yet involve the company, in issuing receipts or other documents which come within the definition of securities as defined by Defence Finance Regulation 6.

Yours faithfully,

HENRY GOVER & SON.

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## ERRATA.

Form 18, p. 295, footnote (f) (last line), for *ante*, p. 262, read *ante*, p. 298; p. 296, footnote (h), for *ante*, p. 264 read p. 265, and on same page, footnote (i), for *ante*, p. 262, read pp. 268 and 270.

# PRECEDENTS

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## Form 1.

**Transfer of Part of Registered Leasehold Title comprising several Leases with  
Variations for Discharge of Registered Charge Relating to the whole Title.**

*H.M. Land Registry.*

Land Registration Acts, 1925-36.

County

Parish

Title No.

Property

1. (Date). In consideration of — pounds (£—) (the receipt whereof is hereby acknowledged) [or paid to A B (*registered proprietor of land*) of *etc.* and of — pounds (£—) paid to C D of *etc.* (*registered proprietor of charge*) (the receipt of which sums respectively the said A B and the said C D hereby respectively acknowledge)] I the said A B as Beneficial Owner hereby transfer to X Y of *etc.* (*the Purchaser*) the land shown and numbered plots 1 and 2 in the filed plan (a) of the title above referred to [or and edged with red on the accompanying plan] and known as — [or described in the Schedule hereto] being part of the land comprised in the title above referred to for the residue of the terms granted by the Leases registered in respect of the said plots [or the said land edged with red].

[2.] And [the said] C D [of *etc.*] as mortgagee hereby discharges the said plots numbered 1 and 2 [or the said land edged with red] hereby transferred from the charge dated the — day of — and registered on the — day of — of which he is the registered proprietor and from all liability in respect thereof [but not so as to release the said A B from any liability in respect of the said charge so far as it relates to other land not hereby transferred or the principal and interest thereby secured] save that the principal shall be reduced by the sum of £— paid hereunder nor shall the said charge hereby be discharged in respect of any other land therein comprised (b).

3. The covenants by the said A B and by the said X Y respectively implied by section 24 of the Land Registration Act 1925 are to be

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(a) Although normally a plan must be attached to a transfer of part of the land comprised in a title this is not necessary if it can be identified by plots shown and numbered on the filed plan. This will normally be the case where several leases are comprised in one title and one or more of these properties are transferred as a whole.

(b) If the land is to be discharged from a registered charge it will be necessary to lodge the charge certificate as well as the land certificate at the Registry prior to or accompanying the lodgment of the transfer.

implied so far only as they relate to the said plots numbered 1 and 2 [or the said land edged with red on the accompanying plan] (c).

4. And it is hereby declared that the covenants for title implied by section 77 of the Law of Property Act 1925 by the said A B being expressed to convey as Beneficial Owner [and the said C D being expressed to discharge as mortgagee respectively] shall be deemed to include all interests rights or liabilities deemed not to be incumbrances by section 70 of the Land Registration Act 1925 except such as were at the date of this transfer apparent on inspection of the said land or by search or to which the contract was expressly made subject (d) (e).

### Form 2.

#### Will of a Spinster providing against Deaths in the same Air-raid or other Common Accident (a).

THIS IS THE LAST WILL of me A B of *etc.* Spinster.

1. I HEREBY REVOKE all Wills and Codicils previously made by me.

2. I BEQUEATH (free of duty) the following pecuniary legacies that is to say :—

3. I GIVE DEVISE and BEQUEATH all the rest residue and remainder of my property and effects whatsoever and wheresoever to such of them my two Sisters C D and E F as shall be living at my death in equal shares if both then alive.

4. PROVIDED that if neither of them my said two Sisters is living at my death then and in that event but not otherwise I give devise and bequeath all the said residue to such of them my Brother G H and my Nieces J K and L M as shall be living at my death in equal shares if more than one.

5. I APPOINT the said C D and E F to be EXECUTRICES of this my Will.

6. I DIRECT that in the event of my death and that of any one or more of the beneficiaries under this my Will being simultaneous or happening within any one period of twenty-four hours or resulting within any one period of seven days from the same accident or design my Will shall be construed so as to take effect as if the Beneficiary or Beneficiaries in question had died during my lifetime.

IN WITNESS *etc.*

(c) This clause may not be necessary in this particular case because the application of s. 24 to this transfer where several separate leases are comprised in one title is obscure. Until the obscurity is dissipated it is better to include it and it can do no harm.

(d) For the reasons for this clause see 3 K. & E. (14th ed.), p. 129.

(e) This precedent does not provide for transfer of part of the land comprised in a lease. Such a case requires provision for the apportionment of rent: see *Precs. V, VI and VII* in 3 K. & E. (14th ed.), pp. 502—505.

(a) This form was drafted by R. Macdonald, Solicitor. Testators are still apprehensive about the possible consequences of deaths in a common accident. Experience suggests that in most cases the concern is not directed to the incidence of death duties but to the ultimate devolution of property. The recent decision in *Re Grosvenor, Peacey v. Grosvenor* (1944) 113 L. J. Ch. 113, has accentuated the need for care in drafting.

This form may be thought suitable and found useful for simple wills, where the estate passing is not large and the testator is not concerned about the risk of additional duty, so long as his testamentary intentions will not be defeated.

## Form 3.

**Option to Purchase Land for a period not exceeding twenty years (a).**

AN AGREEMENT made the — day of — BETWEEN A of *etc.* (hereinafter called “the intending Vendor”) of the one part and B of *etc.* (hereinafter called “the intending Purchaser”) of the other part.

WHEREBY in consideration of the sum of Ten Shillings paid by the intending Purchaser to the intending Vendor (the receipt of which sum the intending Vendor hereby acknowledges) IT IS AGREED as follows:—

1. IF at any time during the period of twenty years from the date hereof the intending Vendor shall desire to sell the property hereinafter described in the Schedule hereto the intending Purchaser shall have the option of purchasing the same in manner and on the terms following:—

(a) The intending Vendor shall give the intending Purchaser notice of his intention to sell the said property and offer the same to the intending Purchaser

(b) The intending Purchaser shall within one month of receiving such notice as aforesaid give notice of his intention to purchase the said property at the price fixed in manner hereinafter appearing

(c) Until the expiration of such period of one month the intending Vendor shall not be at liberty to sell the said property otherwise than in accordance with this option unless the said offer shall in the meantime have been unconditionally declined by the intending Purchaser

(d) If such offer shall be so declined or shall be determined by lapse of time as aforesaid the intending Vendor may thereafter sell or dispose of the property as he shall think fit

(e) The price shall be (a) such a sum as shall be agreed by the parties hereto or (b) in default of agreement the sum agreed after valuation by two valuers one to be appointed by each party or by an umpire or third valuer to be appointed by such valuers before proceeding to act and so that upon default by either party to name a valuer within seven days after being required in writing by the other party to do so the valuer of such other party shall act alone and his valuation shall be final

(f) Upon the fixing of the purchase price the intending Purchaser shall pay to the intending Vendor's solicitor as stakeholder by way of deposit 10 per cent. of the purchase money fixed as aforesaid

(g) The date for completion shall unless otherwise agreed in writing be the first day after the expiration of seven weeks from the date of the fixing of the purchase price or if such day is a Sunday or a public holiday the next following working day

(h) The title to the property shall commence with —

(i) The contract for sale shall incorporate the conditions of sale of the — Law Society applicable to a sale by private treaty.

2. THE provisions of section 196 of the Law of Property Act 1925 as to giving of notices shall be applicable hereto.

AS WITNESS the hands of the parties hereto.

THE SCHEDULE BEFORE REFERRED TO.

(Signed by both parties.)

## Form 4.

**List of Questions and Observations to be added to the usual form of Preliminary Enquiries on draft Contract raised by the Purchaser's Solicitors on the occasion of the Purchase of a Cinema (a).**

1. Please furnish copies of the [trade contracts and engagements] [Hire Purchase Agreement] [Lease of the sound equipment] [Hire Agreement in respect of the Automatic ticket machines] [Tenancy Agreement(s)] [Canopy Agreement] [Restrictive Covenants and Stipulations] [Lease of the property] and [Service Agreement(s)] which are referred to in the draft Contract.

2. Has any part of the Cinema or of the site thereof been taken over under the Emergency Legislation for an Air-raid Shelter or for any other purpose? If so, please give details.

[3. Please furnish a print of the Memorandum and Articles of Association of the Vendor Company.]

4. Please furnish a list of all existing Licences held in connection with the Cinema. In whose names are the Licences please and are they or any of them subject to any unusual restrictions?

[5. What was the date of the erection of the Cinema and what is its seating capacity?]

[6. Is any of the furniture or equipment on hire or hire purchase please? If so, kindly furnish details.] [The Vendor Company must discharge before completion any outstanding liabilities under subsisting Hire Purchase Agreements and produce the discharged Agreements for the Purchaser Company's inspection on completion.]

7. Is queuing at the Cinema regulated by any consent restrictions or regulations issued by the Police or the local or other competent authority? If so, furnish copies of any relevant documents.

[8. What is the sound reproducing system at the Cinema please? If the equipment does not belong to the Vendor Company and is not included in the sale any necessary consents to the assignment to the Purchaser Company on completion of the Agreement or Lease in respect thereof must be obtained by the Vendor Company at their own expense before completion.]

9. Has the Cinema ever been used for "live" shows and is it at present so used? If so, furnish full details.

10. Does the Cinema normally open on Sundays?

[11. Are there any Agreements in respect of canopies, manhole covers, pavement lights or other similar matters? If so, furnish copies.]

12. Are there any rights of way or passageways used in connection with the Cinema which form essential exit passageways from the licensing point of view? If so, are such rights or ways exclusive to the Cinema and are they specifically referred to in the Cinematograph Licence? Also, who is responsible for the upkeep of such passageways and what is their present condition please?

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(a) This and the following form have been drafted by Mr. L. E. Coleman. This form must be adapted to the circumstances. The information given in the draft contract delivered may make the raising of certain of the questions in the form unnecessary.

[13. Has the Cinema a Car Park which does not form part of the Cinema site? If so, state the tenure of such Car Park and whether it is or can be included in the sale.]

14. Has the Vendor Company a Specification and set of Architects' plans etc. of the Cinema? If so, the Purchaser Company will be obliged if these can be produced immediately for inspection and handed over on completion.

15. Has the Cinema or its contents suffered War Damage? If so, full particulars should be furnished together with copies of any relevant claim forms.

[16. As regards the Lease under which the Cinema is held, please state :—

(a) If any alterations or additions have been made to the property since the grant of the Lease and, if so, furnish full particulars with copies of all relevant licences.

(b) If the covenant as to exterior painting and decoration in Clause      has been strictly complied with.

(c) If the covenant as to user in Clause      has been strictly complied with.]

17. It is understood that the consumable stores are to be taken over on completion at a valuation. Will the Vendor Company confirm that such stores will be maintained at a reasonable level pending completion?

18. Is the Cinema operated under an Entertainments Tax Bond or are tax paid tickets employed?

[19. What is the standard bar in relation to the Cinema?]

20. Is any payment made for a stand-by programme? If so, please furnish details.

21. It is assumed that the Vendor Company will be prepared to give to the Purchaser Company a covenant not to compete within a reasonable radius, say,      miles. Please confirm.

22. Will the controlling Shareholders of the Vendor Company be prepared to join in the Contract for Sale and Purchase and therein undertake to put the Vendor Company into voluntary liquidation within      months of actual completion and to proceed with such liquidation and winding up with all reasonable despatch?

23. Have the Vendor Company made any deposits with the local gas, electricity and water undertakings in respect of the supply to the Cinema and Car Park of these services? If so, and it is desired that the Purchaser Company should take over the benefit of such deposits on completion and refund the amount thereof to the Vendor Company full particulars should be supplied now and letters from the undertakings concerned handed over on completion confirming that as from completion such deposits will be held for the benefit and to the credit of the Purchaser Company.

[24. Will the Vendor Company agree to book films pending completion under the direction of the Purchaser Company?]

[25. It is understood that there are no onerous, unusual, long term or service Contracts to be taken over. Please confirm.]

26. The Purchaser Company wish the Contract for Sale and Purchase to be sanctioned by the Vendor Company in General Meeting prior to completion and it is proposed to insert a Clause to this effect in the draft Contract.

## Form 5.

**Contract for the Sale and Purchase of a Freehold or Leasehold Cinema, the Purchase to include the Goodwill, Furniture, Furnishings, Projection Apparatus and other Equipment, Trade Names, Licences, Trade Contracts and Engagements (including Film Hire Contracts) and Outstanding Hire Purchase Agreement in respect of Neon Lighting.**

THIS AGREEMENT is made the — day of — 19— BETWEEN A B LIMITED whose Registered Office is situate at — in the County of — (hereinafter called “the Vendor Company”) of the [first] part [C D of — in the County of — and E F of — in the County of — (hereinafter called “the Shareholders”) of the second part] and G H LIMITED whose Registered Office is situate at — in the County of — (hereinafter called “the Purchaser Company”) of the [third] part WHEREBY IT IS AGREED as follows:—

1. THE Vendor Company shall sell and the Purchaser Company shall purchase:—

(a) [The fee simple absolute in possession subject to the restrictive covenants and stipulations hereinafter mentioned but otherwise free from incumbrances of the piece of land short particulars whereof are set forth in the First Schedule hereto] The leasehold land which is held by the Vendor Company under the Lease short particulars whereof are set forth in the First Schedule hereto] Together with the Cinematograph Theatre [— shop(s)] [Café] [Car Park] [and cycle shed and racks] erected [or laid out] thereon or on some part or parts thereof and the outbuildings belonging thereto all which premises are hereinafter in this Agreement collectively referred to as “the Cinema property”.

(b) The goodwill (a) of the business of Cinematograph Theatre Proprietors now carried on by the Vendor Company on or in connection with the Cinema property

(c) All the plant machinery [(including the typewriter(s)] office theatre and other furniture seating curtains carpets and furnishings [organ] fixtures fittings cinematograph apparatus and screen engines batteries switches electrical and other installations equipment utensils chattels spare parts spare furnishings goods effects and things (except (i) such as are to be taken at a valuation in accordance with the provisions of Clause 4 of this Agreement and (ii) the items referred to in Clause 5 of this Agreement) to which the Vendor Company are at the date of this Agreement entitled in connection with the Cinema property and/or the said business or which at such date are on in or about or used or for use in connection with the Cinema property and/or the said business including the chattels particulars whereof are set out in

(a) It is doubtful whether there is any personal goodwill in a cinema business. Some goodwill may attach to the theatre building, but except, possibly, in remote country areas the amount of business which a cinema does depends, as a general rule, entirely on the nature of the films exhibited. On the other hand, while E.P.T. is in force it would presumably be in the interest of the vendor company (in the event of their not agreeing to go into voluntary liquidation and acquiring another cinema contemporaneously with or shortly after the sale which is the subject of this agreement) to contend and satisfy the Commissioners of Taxes that their trade had never been discontinued; in which event the vendor company would, it is thought, be entitled to the profits standard calculated on the profits of the cinema which is the subject of this agreement and the purchaser company could not therefore succeed to such profits standard. In most cases, therefore, it will be desirable to include the goodwill in the sale.

an Inventory signed for identification by — on behalf of the Vendor Company and delivered to the Purchaser Company prior to the execution of this Agreement (b)

(d) The exclusive right (so far as the Vendor Company can grant the same) to the use of the name "—" (c) in connection with the Cinema property and the said business and also of all trade marks trade names and other like rights whatsoever connected with the Cinema property and the said business and the right to represent the Purchaser Company as carrying on the Cinema property and the said business in continuation of the Vendor Company and in succession thereto

(e) The benefit (so far as the Vendor Company are able to transfer the same and subject to all the obligations of the Vendor Company thereunder) of all licences (d) subsisting at the date hereof in respect of the Cinema property and/or the said business short particulars of which licences are set forth in the Second Schedule hereto

(f) The full benefit and advantage as from completion of the purchase (so far as the Vendor Company are able to transfer or assign the same and subject to all the liabilities of the Vendor Company thereunder) of and (so far as the Vendor Company can grant the same) the right to enforce all forward trade contracts and engagements (including contracts or agreements for film hire whether subsisting at the date of this Agreement or entered into after such date and before completion of the purchase in accordance with the provisions of Clause 17 (v) of this Agreement) to which the Vendor Company (either directly or through their nominees) are or may be entitled in connection with the Cinema property and/or the said business short particulars of which contracts and engagements at the date of this Agreement are set forth in Parts I and II of the Third Schedule hereto

[(g) The benefit (so far as the Vendor Company are able to transfer or assign the same and subject as hereinafter mentioned) of an Agreement for Hire with an option to purchase dated — 19— entered into by the Vendor Company with — in respect of the [neon tube lighting affixed to the canopy, halo and other exterior parts of the Cinema property] (e) and also the benefit of all payments made by the Vendor Company under the terms of such Agreement.]

2. THE consideration for the said sale shall be the sum of £—— which shall be paid and satisfied in cash and the Purchaser Company shall on the execution of this Agreement pay to Messrs. — of — the Vendor Company's Solicitors as [agents for the Vendor Company] [Stakeholders] the sum of £—— as a deposit and in part payment of the said consideration.

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(b) It is thought that it is preferable to use the expression "including the chattels . . ." instead of "being the chattels . . ." as there may be chattels which are normally used in connection with the cinema but which are for some reason not on the property when the inventory is prepared.

(c) *E.g.*, "Plaza".

(d) In making the usual searches and inquiries of the local and county authorities the latter should be asked to confirm that the cinematograph and other licences are in force and are free from any unusual restrictions or alternatively to furnish a copy of any special restrictions attaching. In some cases the county authority delegates its licensing powers to the local authority or to the justices, in which event, of course, the inquiry should be addressed to the appropriate quarter.

(e) Hire-purchase agreements may also be in force in relation to other items of equipment: *e.g.*, the organ or the sound reproduction equipment.

3. THE said consideration shall for the purposes of Stamp Duty be apportioned as follows amongst the various items referred to in Clause 1 of this Agreement, that is to say :—

(a) the [freehold] [leasehold] property and the fixed plant and machinery thereon £——

[ (b) tenants' and trade fixtures on such leasehold property £—— ] (f)

(c) the goodwill of the said business £—— (f)

(d) the loose plant furniture furnishings seating curtains equipment and such of the other items referred to in sub-clause (c) as constitute moveables and the title to which passes by delivery £——

(e) the trade marks and trade names £—— (f)

(f) the licences £——

(g) the pending contracts and engagements including film hire contracts £—— (f)

[ (h) the benefit of the payments made under the Hire Purchase Agreement in respect of the neon lighting £——. ]

[4. The Vendor Company shall also sell and the Purchaser Company shall purchase at a valuation to be made by two Valuers (one to be appointed by either party) or their umpire all stock-in-trade in the nature of consumable stores (including coal coke spare lamps spare carbons [tax paid tickets] (g) chocolates sweetmeats tobacco and cigarettes [and the supplies of tea coffee and other similar items and the stores of tinned bottled and other food in the Café]) or other articles (other than spare parts and spare furnishings) for use in or in connection with the running of the Cinema property or the said business or for sale to the patrons [or customers] thereof which on the day of completion of the purchase are on the Cinema property Provided that if either party shall refuse or neglect to appoint a Valuer to act under this Clause and to notify such appointment with the relevant particulars to the other party in writing within seven days after being required by the other party so to do or if the Valuer appointed by either party shall refuse or neglect to proceed to valuation or to nominate an umpire on request then the valuation shall be made by the Valuer appointed by the other party alone and shall if the appointment of the Valuer so acting alone shall have been duly notified in writing to the opposite party be binding on such opposite party (h).]

[5. (a) THE following items which are on in or about the Cinema property are excluded from the sale :—

(i) The Sound Reproduction equipment which is held by the Vendor Company on Lease from ——

(ii) The automatic ticket issuing machines which are held by the Vendor Company on Hire Agreement from ——

(f) The *ad valorem* duty on the proportions of the consideration covering these items is payable on this contract, but it can successfully be contended with the Revenue authorities (i) (in the majority of cases) that the value of the goodwill is "nil", (ii) (in the case of leaseholds and if such is the fact as it normally is) that there are no tenants' and trade fixtures which do not come under either (a) or (d) of clause 3 of this precedent, (iii) that the trade name or names are of no monetary value, and (iv) that the pending contracts and engagements are of no monetary value so far as the purchaser company is concerned.

(g) Where there are automatic ticket issuing machines it is unlikely that there will be tax paid tickets as there will normally be an entertainments tax bond.

(h) In some cases the consideration is inclusive of the consumable stores and in that event this clause should be omitted and Clause 1 amended accordingly.

As regards these items however the Vendor Company shall [at their own expense] [at the expense of the Purchaser Company] prior to completion of the purchase make application for and use their best endeavours to obtain licences (i) authorising the assignment to the Purchaser Company on completion of the purchase of such Lease (for the residue remaining unexpired of the term thereof and subject to the payments by way of rent or otherwise thereby reserved and to the covenants and conditions therein contained and on the part of the Lessee to be performed and observed) and of such Hire Agreement (subject to all the obligations of the Vendor Company thereunder) and in the event of such Licences being forthcoming the requisite assignments shall be made and executed and the said Lease and Hire Agreement shall be included in the contracts and engagements which are to be the subject of the covenant on the part of the Vendor Company which is referred to in Clause 13 (c) (ii) of this Agreement unless such Assignments shall themselves contain equivalent covenants

(b) The Purchaser Company having been furnished prior to the execution of this Agreement with copies of the said Lease and Hire Agreement shall be deemed to have full knowledge of the contents thereof respectively and shall not raise any requisition or objection in regard thereto

(c) The Purchaser Company shall be entitled without making any payment to the Vendor Company apart from the consideration to the benefit of all payments of any kind which the Vendor Company have made prior to the execution of this Agreement under the said Lease or Hire Agreement or either of them.]

6. THE Vendor Company are selling as Beneficial Owners.

7. THE Cinema property is sold subject to :—

(a) All rights of way (whether public or private) water light drainage and other easements quasi-easements rights and privileges (if any) affecting the same or any part thereof and to any subsisting liability to repair or contribute to the repair of party walls or fences sewers drains and gutters or roads streets and passages upon which the Cinema property or any part thereof abuts

[(b) All Land Tax and Tithe Redemption Annuity affecting the same or any part thereof]

(c) The [tenancy] [tenancies] of the [Café] [shop(s)] short particulars whereof are set forth in the Fourth Schedule hereto and all allowances to and claims for compensation and other rights of the Tenant(s) whether arising during the continuance of or after the expiration of the [tenancy] [tenancies]. The Purchaser Company having been furnished prior to the execution of this Agreement with a [copy] [copies] of the Tenancy Agreement(s) with the Tenant(s) shall be deemed to have full notice of the contents thereof [respectively] and shall not raise any requisition or objection in regard thereto

(d) An Agreement dated the — day of — 19— and made between — relating to the canopy (k) which overhangs the public footway on the — Street frontage of the Cinema property. The

(i) In some cases the company owning the equipment has a standard printed form of assignment which is completed by the company and issued for execution if they approve the purchaser company. In such event a formal licence to assign is not issued.

(k) Canopy agreements are frequently treated as trade contracts, but it is thought that in the majority of cases they should be brought on to the title.

Purchaser Company having been furnished prior to the execution of this Agreement with a copy of the said Agreement shall be deemed to have full knowledge of the contents thereof and shall not raise any requisition or objection in regard thereto

(e) All liabilities under present and future Town Planning Schemes and bye-laws which may be in force in the area in which the Cinema property is situate

[(f) The restrictive covenants and stipulations contained in — The Purchaser Company having been furnished prior to the execution of this Agreement with a copy of such restrictive covenants and stipulations shall be deemed to have full knowledge thereof and shall not raise any requisition or objection in regard thereto.]

8. [(a)] THE Purchaser Company having been furnished prior to the execution of this Agreement with copies of the Licences and the trade contracts and engagements [and Hire Purchase Agreement] referred to in Clause 1 of this Agreement [and of the Lease referred to in the First Schedule of this Agreement and of the plan thereon] shall be deemed to have full knowledge of the contents of all such documents respectively and shall not raise any requisition or objection in regard thereto

[(b) The production by the Vendor Company on completion of the purchase of the receipt for the payment of Ground Rent last accrued due under the last-mentioned Lease shall [unless the contrary appears] be accepted by the Purchaser Company as [conclusive] [sufficient] [prima facie] evidence that all the covenants and conditions contained in the said Lease have been duly observed and performed or that any breach thereof has been effectually waived down to the actual completion of the purchase and the Purchaser Company shall not be entitled to ask for evidence that the person giving such receipt is or is still the reversioner expectant on the determination of the term granted by the said Lease.]

9. (a) THE title to the Cinema property shall commence with [the said Lease and shall continue with an Assignment on Sale dated — and made between —] [—] and the Purchaser Company shall not be entitled to or require any earlier title or raise any requisition or objection in reference thereto

(b) The Purchaser Company shall not take exception or raise any requisition or objection by reason — (l)

[(c) The Vendor Company shall not be required to produce or deliver or procure to be produced or delivered to the Purchaser Company any deeds or documents not in the possession or control of the Vendor Company or their Mortgagees nor shall they be liable for any expense incurred in tracing the whereabouts of and obtaining production or delivery to the Purchaser Company of any such deeds and documents and no requisition or objection shall be raised in regard to such non-production or non-delivery.]

10. THE Purchaser Company shall admit the identity of the Cinema property with that comprised in the documents offered by the Vendor Company as the title to the Cinema property upon the evidence afforded

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(l) Here insert particulars of any matters on the title in respect of which it is desired to bar the purchaser company from objecting or raising requisitions.

by a comparison of the descriptions contained in the First Schedule hereto and in those documents.

11. (a) NOTWITHSTANDING any and every mis-statement inaccuracy or omission in this Agreement or in any Schedule hereto [or in the plan attached hereto] the Purchaser Company shall be deemed to buy with full knowledge of the state and condition of the Cinema property and of every part thereof

[(b) Any statement or the absence of any statement in this Agreement or in any Schedule hereto [or in the plan attached hereto] as to any easement outgoing right privilege or other matter affecting the Cinema property or any part thereof is not to be taken as a representation that nothing else or nothing affects the Cinema property or any part thereof]

(c) The Cinema property shall be at the risk of the Purchaser Company as from the date of this Agreement and no compensation shall be payable to or demanded by the Purchaser Company from the Vendor Company for any loss or deterioration thereto or to any part thereof caused otherwise than by the wilful act or neglect of the Vendor Company

(d) The Cinema property is believed and shall be taken to be correctly described and no [slight] error omission or mis-description of the Cinema property shall invalidate this Agreement or be the subject of compensation on either side [Provided however that nothing in this Clause contained shall entitle the Vendor Company to compel the Purchaser Company to accept or the Purchaser Company to compel the Vendor Company to [convey] [assign] property which differs substantially whether in quantity quality tenure or otherwise from the property hereby agreed to be sold and purchased.]

12. (a) THE Purchaser Company shall within ——— days after the delivery of the Abstract of Title deliver to the Solicitors of the Vendor Company in writing their Requisitions and Objections (if any) to or in respect of the title or evidence of title or the Abstract or this Agreement and subject thereto the title shall be deemed to be accepted and all Requisitions and Objections not included in any such statement are to be deemed waived. An answer to any Requisition or Objection shall be replied to in writing within ——— days after the delivery thereof and if not so replied to is to be deemed satisfactory

(b) If the Purchaser Company shall raise any Requisition or Objection which the Vendor Company are unable or [on the ground of expense or other reasonable ground] unwilling to remove or comply with [or if any question or dispute shall arise as to the [Conveyance] [Assignment] to the Purchaser Company] and the Purchaser Company shall not withdraw such Requisition or Objection [or waive or settle such dispute] within seven days after being required so to do the Vendor Company may by notice in writing delivered or sent to the Purchaser Company or their Solicitors and notwithstanding any intermediate negotiation [or litigation] rescind this Agreement and in that event the Vendor Company are forthwith to repay to the Purchaser Company the deposit but without interest costs or compensation and the Purchaser Company is thereupon to return to the Vendor Company the Abstract of Title and all other papers and documents in their possession belonging to the Vendor Company.

13. (a) THE [Conveyance] [Assignment] to the Purchaser Company shall be prepared by the Purchaser Company at their own expense and the draft thereof shall be sent to the Solicitors for the Vendor Company at least — days and the engrossment sent to the said Solicitors at least — days before completion of the purchase

(b) The Purchaser Company shall not in such [Conveyance] [Assignment] require any covenant or undertaking for or with reference to the safe custody of any deeds or documents properly or usually retained by any personal representative trustee or mortgagee save that if a mortgagor not being in a fiduciary position concurs in such [Conveyance] [Assignment] he shall if so required covenant that if and when he receives the deeds or documents in question he will at the request and cost of the person requiring it give an undertaking for the safe custody thereof

(c) The [Conveyance] [Assignment] to the Purchaser Company shall include :—

- [(i) A covenant by the Purchaser Company (on behalf of themselves and their successors and assigns) with the Vendor Company [(by way of indemnity only)] that the Purchaser Company will observe and perform the hereinbefore mentioned restrictive covenants and stipulations and keep the Vendor Company indemnified from and against all actions proceedings costs charges claims demands and expenses whatsoever in respect of any breach thereof arising after completion of the purchase]
- [(ii) A covenant by the Purchaser Company (on behalf of themselves and their successors and assigns) with the Vendor Company that the Purchaser Company will duly pay satisfy discharge and fulfil all the liabilities of the Vendor Company [and their nominees (if any)] subsisting at completion of the purchase in relation to (a) the forward contracts and engagements of the Vendor Company to be taken over by the Purchaser Company under the terms of this Agreement [(b) the Hire Purchase Agreement referred to in Clause 1 (g) of this Agreement] [and (c) the Tenancy Agreement(s) [and Canopy Agreement respectively] referred to in Clause 7 of this Agreement] and will indemnify the Vendor Company [and any nominee of the Vendor Company who may be personally liable thereunder] from and against all actions proceedings costs charges claims demands and expenses whatsoever in respect of any breach thereof arising after completion of the purchase]
- [(iii) A covenant by the Vendor Company that they will not (except as provided by Clause 19 (d) hereof) during the period of — years from the date of this Agreement either themselves or through any Subsidiary or Associated Company or jointly with or as Agents for any person firm or Company carry on or be (either directly or indirectly) in any way engaged concerned or interested in the business of Cinematograph Theatre Proprietors within a radius of — miles from the Cinema property.]

14. IF after the date of this Agreement and before completion of the purchase any requirements or demands shall be made by the Local County or other competent authority in respect of the Cinema property or any part thereof the Purchaser Company shall on completion of the purchase repay to the Vendor Company all moneys expended by them in complying with each and every such requirement or demand and in case any such requirements or demands have not been complied with at that date then the Purchaser Company shall in the [Conveyance] [Assignment] covenant to indemnify the Vendor Company in respect thereof PROVIDED however that on receipt of notice of each such requirement or demand the Vendor Company shall forthwith inform the Purchaser Company in writing and give to the Purchaser Company (without prejudice to any other rights of the parties) the option and opportunity of complying therewith in lieu of the Vendor Company doing so or of contesting the same at their own expense and the Vendor Company shall not expend any moneys for the purpose aforesaid unless the Purchaser Company shall refuse or neglect to comply with such requirement or demand within a reasonable time.

15. THE Vendor Company shall not after the date of this Agreement except with the previous written consent of the Purchaser Company enter into any engagement contract or commitment whatsoever in relation to the Cinema property or any part thereof or to the said business.

[16. THE Purchaser Company shall subject to the consents of the Insurers concerned take over on completion of the purchase and be entitled to the benefit of and the Vendor Company shall maintain in force at least until completion of the purchase all current insurances now held by the Vendor Company both in relation to the Cinema property and the said business and the Purchaser Company shall pay to the Vendor Company on completion of the purchase a rateable proportion (calculated from the date of this Agreement in the case of fire insurances but from the date of completion of the purchase in the case of other insurances) of all premiums paid by the Vendor Company for the upkeep of such insurances.]

17. THE Vendor Company hereby represents and warrants to the Purchaser Company :—

- (i) That all unusual or onerous Contracts and all long term Contracts outstanding at the date of this Agreement have been fully disclosed
- (ii) That no Contract of Service or Service Agreement exists or will exist at completion of the purchase in connection with the Cinema property or the said business which is not capable of termination on — weeks' notice or less without payment of compensation
- [(iii) That all the terms and provisions of the [Hire Purchase Agreement referred to in Clause 1 (g) of this Agreement and of the] Lease and Hire Agreement respectively referred to in Clause 5 of this Agreement have been duly performed up to the date of this Agreement [and] that all rentals and other payments which have accrued due thereunder respectively have been duly paid] [and that the Vendor Company will continue duly and punctually to observe and perform all their

- obligations under the said [Hire Purchase Agreement] Lease and Hire Agreement respectively down to completion of the purchase]
- [(iv) That (subject to certain conditions of which the Purchaser Company are (as they hereby acknowledge) aware) (*m*) the Owners of the equipment which is the subject of the said Hire Purchase Agreement have agreed to the benefit of such Agreement being transferred to the Purchaser Company as provided by this Agreement]
- (v) That all film hire Contracts to be fulfilled after completion of the purchase are or will be in respect of films suitable for the Cinema property and on terms usual for the Cinema property and that pending completion of the purchase film hire Contracts shall be entered into in the ordinary course of business but subject to prior approval by the Purchaser Company
- (vi) That [(except as disclosed in this Agreement or as disclosed in writing by the Vendor Company to the Purchaser Company prior to the execution of this Agreement)] all the chattels in upon or about the Cinema property or normally used or for use in connection therewith including those specified in the Inventory referred to in Clause 1 (c) of this Agreement are the sole property of the Vendor Company and [subject to the provisions of Clause 4 of this Agreement] are included in the sale hereby agreed to be made
- (vii) That there will on completion of the purchase be on the Cinema property reasonably substantial stocks of spare parts and spare furnishings and of consumable stores [of the nature referred to in Clause 4 of this Agreement] and that the Vendor Company have not since the date of the conclusion of the negotiations for this sale namely the — day of — 19— sold nor will pending completion of the purchase sell or use any part of such stocks (other than in the ordinary course of business) or sell any of the chattels referred to in Clause 1 (c) of this Agreement
- (viii) That the Vendor Company or their nominees hold all requisite Licences to carry on the said business on the Cinema property and that nothing has been suffered or done which may or might prejudice any such Licence
- [(ix) That [(except as disclosed in writing by the Vendor Company to the Purchaser Company prior to the execution of this Agreement)] no profits are included in the Profit and Loss Accounts and Balance Sheet which have been produced to the Purchaser Company or the Purchaser Company's Agents or Accountants in respect of the last financial year or other shorter period of the said business other than profits of a nature and from sources which will accrue to the Purchaser Company as a result of the acquisition by the Purchaser Company of the said business.]

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(*m*) The conditions will normally include a covenant by the purchaser company with the owners (on a printed form provided by the owners) that the purchaser company will punctually pay to the owners all remaining instalments due to them under the hire-purchase agreement and otherwise fully and properly observe and perform the terms and conditions thereof so far as the same remain to be observed and performed.

18. If prior to completion of the purchase the Cinema property or any part thereof shall be requisitioned by a competent authority or shall suffer [such] War Damage [that the same cannot be rendered fit for normal use within a period of — months from the happening of such damage] then the Purchaser Company shall be at liberty by notice in writing to rescind this Agreement and on such notice being given this Agreement shall be null and void and the Vendor Company shall thereupon return to the Purchaser Company the deposit but without interest costs or compensation and the Purchaser Company shall thereupon return to the Vendor Company the Abstract of Title and all other papers and documents in their possession belonging to the Vendor Company.

19. (a) THE completion of the purchase and payment of the balance of the consideration shall take place on the — day of — 19— (n) at the office of the Vendor Company's Solicitors and the Purchaser Company paying the balance of the consideration are as from that day to be let into possession and into receipt of the rents and profits of the Cinema property and of the said business and pay all the outgoings [including all rates and taxes made before but not demanded until after that day] in respect thereof and up to that day all rents rates taxes and other outgoings shall (if necessary) be apportioned and on completion the balance shall be paid by or allowed to the Purchaser Company as the case may be

(b) If from any cause [whatever other than the wilful default of the Vendor Company] [attributable to the default of the Purchaser Company] the completion of the purchase is delayed beyond the said — day of — 19— the balance of the consideration shall bear interest at — % p.a. from that day until the day of actual payment thereof (o) but the Vendor Company shall have the option of taking the rents and profits of the Cinema property and the said business (less outgoings) up to the date of actual completion of the purchase instead of the said interest and the Purchaser Company shall not be entitled to any compensation for the Vendor Company's delay or otherwise

(c) If completion of the purchase shall not take place on the said — day of — 19— and the Vendor Company elects to take interest under the last foregoing sub-Clause then as from the said — day of — 19— the Vendor Company shall be deemed to be carrying on the said business for and on behalf and at the risk of the Purchaser Company and shall account and be entitled to be indemnified accordingly

(d) The possession of the Cinema property and control of the said business shall be retained by the Vendor Company up to the day of actual completion of the purchase and in the meantime the Vendor Company shall carry on the said business on the Cinema property in a normal and proper manner so as to maintain the same as a going concern.

[20. THE Purchaser Company having been furnished prior to the execution of this Agreement with copies of all relevant Contracts of

(n) It is usually convenient to arrange for completion to take place on a Monday as this saves apportionment of such items as staff wages and film hire and transport.

(o) The vendor company frequently prefers to take the profits and pay the outgoings up to the date of actual completion in lieu of interest. In such event the provision for payment of interest can be deleted.

Service or Service Agreements (if any) shall on completion of the purchase take over the staff at present employed by the Vendor Company in connection with the Cinema property and the said business on the same terms as such staff are at present engaged.]

[21. THE instalment of War Damage Contribution payable under the War Damage Act 1943 in respect of the Cinema property [and falling due] [which fell due] on the — day of — [next shall be discharged by the Vendor Company and] [last and which was then discharged by the Vendor Company] shall as between the Vendor Company and the Purchaser Company be treated as an outgoing (p) covering the period 1st January 19— to 31st December 19— and apportioned on completion of the purchase accordingly.]

22. THE Vendor Company shall on completion of the purchase do or procure the doing of all such acts deeds and things as shall be reasonably required of them by the Purchaser Company to enable interim authority for the Purchaser Company to carry on the said business to be obtained and to enable the Purchaser Company to obtain transfers in their favour or in favour of their nominees of all the Licences referred to in Clause 1 of this Agreement the benefit whereof so far as transferable is included in this sale and the Vendor Company shall as from completion of the purchase (so far as it lawfully can but subject to such consents as may be necessary being forthcoming) hold all such Licences in trust for the Purchaser Company until the transfer thereof to the Purchaser Company.

[23. THE Shareholders (in consideration of the present sale and in their capacity of controlling Shareholders of the Vendor Company) hereby jointly and severally undertake with the Purchaser Company that they will within — months from the date of actual completion of the purchase take at their own expense or at the expense of the Vendor Company all such steps as may be necessary to put the Vendor Company into voluntary liquidation (q) and will proceed with such liquidation and complete the winding up with all reasonable despatch.]

24. THE Vendor Company shall at all times after completion of the purchase allow the Purchaser Company reasonable access to the books of account and record of the Vendor Company in relation to the Cinema property and the said business [and will [use their best endeavours to] procure that such books of account and record shall if the Purchaser Company so requires be handed over to the Purchaser Company by the Liquidator of the Vendor Company when the Vendor Company shall go into liquidation conformably with the provisions of the last foregoing Clause of this Agreement.]

[25. THE Vendor Company have in their possession a specification and complete set of Architects' plans and drawings sections and elevations relating to the Cinema property and these shall be handed over to the Purchaser Company on completion of the purchase] (r).

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(p) This seems to be usual nowadays.

(q) This prevents competition and also further protects the E.P.T. position (see note (a)) but clause 13 (c) (iii) can be used instead if preferred.

(r) If the theatre is a modern one this specification and plans should be obtained, if possible, as they may prove to be most useful. If the vendor company can be persuaded to lend the plans to the purchaser company prior to completion and they include (as they usually do) a site plan this should be carefully checked against the plans on this contract and on the abstract of title to ensure that the theatre has been erected wholly on the

26. THIS Agreement shall be sanctioned by the Vendor Company in General Meeting prior to completion of the purchase and a certified copy of the relative minute shall be supplied to the Purchaser Company on or before completion of the purchase (s).

27. IF the Purchaser Company neglects or fails to perform this Agreement on their part then their deposit shall (unless the Court otherwise orders) be forfeited to the Vendor Company who may then (either with or without notice) resell the Cinema property and the said business without previously tendering a [Conveyance] [Assignment] to the Purchaser Company and any resale may be made by auction or by private contract at such time subject to such conditions and in such manner generally as the Vendor Company thinks proper.

IN WITNESS etc.

THE FIRST SCHEDULE ABOVE REFERRED TO.

[Here insert in the case of freeholds a description of the land being sold by reference to a plan to be attached to this Agreement and in the case of leaseholds short particulars of the lease in columnar form.]

THE SECOND SCHEDULE ABOVE REFERRED TO.

| Date. | Description. | Parties. | Date of Expiry. |
|-------|--------------|----------|-----------------|
|-------|--------------|----------|-----------------|

[Here insert particulars of all subsisting Licences.]

THE THIRD SCHEDULE ABOVE REFERRED TO.

PART I.

| Date. | Description. | Parties. |
|-------|--------------|----------|
|-------|--------------|----------|

[Here set out particulars of all trade contracts other than film hire contracts.]

PART II.

| Playing date and<br>no. of days. | Name of Film. | Name of Renter. | Price. |
|----------------------------------|---------------|-----------------|--------|
|----------------------------------|---------------|-----------------|--------|

[Here insert the necessary particulars of the films booked in order of the dates of exhibition.]

THE FOURTH SCHEDULE ABOVE REFERRED TO.

| Date. | Parties. | Term and Rent. | Short description of<br>property let. |
|-------|----------|----------------|---------------------------------------|
|-------|----------|----------------|---------------------------------------|

[Here insert particulars of any Tenancy Agreement or Agreements subject to which the sale is being made.]

land the title to which is being deduced. Such checking may necessitate a proper survey on the site by a competent surveyor.

(s) From a purchaser's point of view this provision is desirable.

## Form 6.

**Stock Questions and Observations before Contract Relating to the Purchase of a Company (a).**

## 1. Please furnish :—

- (a) a certified print of the memorandum and articles of association
- (b) a certified copy of the certificate of incorporation
- (c) certified copies of any certificates of change of name
- (d) certified copies of any special or extraordinary resolutions passed by the company and of the drafts of any now proposed to be passed or in course of being passed
- (e) a certified copy of the company's mortgage register together with certified prints of any trust deeds executed by the company to secure issues of debentures or debenture stock, specimens of any debentures issued by the company and copies of any mortgages created by the company which for any reason are not capable of being redeemed on six months' notice or less
- (f) a certified copy of the last annual return filed
- (g) certified copies of all returns of allotment filed
- (h) full particulars of any increases or reductions of capital which have taken place
- (i) copies of any unusual onerous long term hire hire-purchase maintenance advertising service or other agreements entered into by the company and subsisting at the date hereof with particulars of any such agreements into which the company has agreed or proposes to enter
- (j) copies of any guarantees given by the company and particulars of any suretyships into which the company has entered or agreed or proposes to enter
- (k) a list of any registered trade marks belonging to the company or in course of registration by the company with all relevant details of registration

Where certified copies are requested it will be sufficient if they are certified under the hand of the managing director or the secretary of the company.

2. Please state the address of the registered office and the name and address of the company's bankers.

3. Has the company a bank overdraft? If so please state the amount and how it is secured?

4. Are there any proposals on foot for alteration of the memorandum or the articles change of name increase or reduction of

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(a) This form was drafted by Mr. L. E. Coleman. These questions and observations have been drawn on the assumption that intending purchasers of the share capital of a company would, at the outset, have satisfied themselves on all matters of general detail including the nature and scope of the company's business; the number and type of offices and factory buildings owned or held on lease by the company; the nature of the standing charges; the average net profits for (say) the last three trading years and the taxation and E.P.T. position. Furthermore, it is to be observed that each transaction of this kind produces its own special problems which cannot be foreseen or dealt with in a precedent such as this.

capital the making of calls in respect of shares not fully paid? If so kindly furnish full particulars.

5. Has the registrar of companies ever threatened to strike the company off the register? If so full particulars should be supplied.

6. Are any legal or other proceedings threatened pending or outstanding against the company? If so details should be supplied.

7. Please furnish full particulars of any charge lien or incumbrance of whatsoever nature or kind which affects the shares or any of the shares forming the subject of the proposed sale. Any such charge lien or incumbrance must be fully satisfied on or before completion.

8. A detailed list of the company's outstanding debts as at the date hereof should be furnished. The company must not except in the usual course of business contract further debts after the date hereof except with the previous consent in writing of the Purchasers.

9. If the company's articles contain a provision to the effect that no share or shares may be transferred to a person who is not a member or any other provision or provisions to which the Purchasers object then the Vendor shareholders must in the proposed contract agree to procure before completion the amendment of the articles in such manner as the Purchasers shall require.

10. Please furnish a copy (certified by the company's accountants) of the current profit and loss account and balance sheet (hereinafter referred to as "the Balance Sheet") of the company. The Purchasers will in the proposed contract require the Vendor shareholders and each of them to warrant to the Purchasers and such shareholders jointly and severally to covenant with the Purchasers:—

- (a) that as at the date of the Balance Sheet the assets and liabilities of the company were as stated therein
- (b) that since the date of the Balance Sheet there has been no material alteration in the financial position of the company
- (c) that since the date of the Balance Sheet the company has carried on its business in the usual course and has not incurred any obligations or liabilities except in the usual course of business or declared or paid any dividend on any of its shares or issued any further shares or reduced its capital
- (d) that until completion of the sale the company will continue to carry on its business in the usual course and will not enter into any contract or commitment or incur any obligations or liabilities except in the usual course of business or declare or pay any dividend on any of its shares or issue any further shares or reduce its capital
- (e) that all subsisting or proposed unusual onerous long term hire hire-purchase maintenance advertising service or other agreements and all agreements between the company and any of its shareholders have been fully disclosed to the Purchasers (b)

(b) If the purchasers object to the provisions of any of the subsisting agreements they should stipulate in the contract for the same to be terminated on completion at the expense of the vendor shareholders and should include in the vendor shareholders' warranty and covenant (see clause 10) a provision that the company will be under no liability in respect of such agreements, specifying them. As regards agreements proposed to be entered into by the company, if the purchasers object to these or any of them they should request the vendor shareholders to arrange for them to be abandoned.

- (f) that the company has not exercised or purported to exercise a lien over any of its shares and that no call on any such shares is outstanding
- (g) that the shares agreed to be sold are or will on completion be free from any charge lien or incumbrance
- (h) that as from the date of completion the Purchaser shall be entitled to all dividends rights and benefits whatsoever accrued or to accrue in respect of the said shares
- (i) that immediately prior to completion the company will duly appoint to its board of directors such number of persons nominated in that behalf by the Purchasers as shall constitute a quorum of such board without counting any of the other directors thereof and that on or before completion all such other directors and the managing director and the secretary will resign their respective offices and that each of them will deliver to the company a written notice acknowledging that he has no claims against the company and that on completion copies of all such notices shall be handed to the Purchasers (c).

11. The Purchasers will prior to contract require their solicitors to examine and approve the title to each of the properties belonging to the company and the necessary abstracts of title should therefore now be furnished or alternatively the deeds produced for the inspection of the Purchasers' solicitors. The title in each case must be deduced for the full statutory period (except in the case of any titles registered under the Land Registration Acts 1925—1936 with absolute or good leasehold titles) unless the Purchasers' solicitors otherwise agree. The Purchasers' solicitors and accountants must also be given all such facilities as they may require for inspecting the accounts books records and other documents of the company and the contract must provide for all such accounts books records and other documents together with the company's seal (d) and also the whole of the title deeds relating to the company's properties (except where any such property is in mortgage and the deeds are in the possession of the mortgagee) to be handed to the Purchasers on completion.

12. The transaction will be subject to a provision which must be inserted in the contract that no circumstances exist which would by virtue of any existing emergency legislation render unlawful the sale and transfer of the shares which form the subject of the proposed sale and purchase.

Dated this ——— day of ——— 19——.

.....  
*Purchasers' solicitors.*

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(c) In the majority of cases the managing director and secretary will hold service agreements with the company and compensation will have to be paid to them unless they are also the vendor shareholders in which event it may be part of the bargain that no compensation shall be paid. If compensation is to be paid and the company is to pay it then some limitation of the amount should be inserted in the contract.

(d) The company may also keep a seal abroad (see section 32, Companies Act, 1929) in which event special arrangements for its delivery to an authorised person must be made.

## Form 7.

**Deed by a Beneficiary with a Life Interest in a Trust Fund Releasing a Testamentary Power Over Part of the Capital of the Fund, a Portion of the Capital being Paid to the Life Tenant with the Consent of the Beneficiary Entitled in Default of Appointment (a).**

THIS DEED OF RELEASE AND TRUST made the — day of — Parties.  
BETWEEN A of *etc.* of the first part B of *etc.* of the second part C of  
*etc.* and D of *etc.* (hereinafter called "the Trustees") of the third part

WHEREAS :—

(1) Z (hereinafter called "the Testator") duly made his last will  
dated the — day of — and thereby appointed the Trustees to be  
the executors and trustees thereof and he bequeathed to the Trustees  
free of duty the sum of £X (hereinafter called "the Settled Legacy")  
upon trust for investment and to hold the same and the income thereof  
upon trust to pay the said income to his daughter the said A during  
her life and upon trusts if A should not die in his lifetime for such person  
and purposes generally as A should by will or codicil appoint and in  
default of and subject to any testamentary appointment by A in trust  
to fall into and form part of his residuary estate and the Testator  
directed his Trustees to hold his residuary estate upon trust for the  
said B absolutely

Recitals :  
will of  
Testator ;

(2) The Testator died on the — day of — and his said will  
was duly proved by the Trustees in the — Probate Registry on the  
— day of —

death of  
Testator ;

(3) A is desirous that the sum of £Y part of the settled legacy  
should be raised thereout and applied in the purchase of an annuity for  
her during the residue of her life

desire to  
raise capit

(4) B according to his interest in the settled legacy is ready and  
willing that the said sum of £Y should be so raised and applied upon the  
condition that the reversionary interest of B in the further sum of  
£Z further part of the settled legacy should be made absolute in  
manner and upon the terms hereinafter expressed

consent of  
reversioner

(5) For the purposes of effectuating the intention of the parties  
A has determined to release her said testamentary power of appoint-  
ment in manner and to the extent hereinafter mentioned

NOW THIS DEED WITNESSETH and it is hereby agreed and declared  
as follows :—

(A) In consideration of the premises A doth hereby release and  
discharge from her said power of appointment such parts of the  
settled legacy as shall at the date hereof be of the value of £Y+Z  
together with the costs of all parties leading up to and of the prepara-  
tion and execution of these presents to the intent that her said power  
shall in respect of such parts (but not further) be wholly extinguished  
and no longer exercisable by her

Release of  
power.

(B) The Trustees shall as soon as may be raise out of the settled  
legacy the said sum of £Y+Z and the amount of the said costs (which  
they shall pay and discharge) and shall apply £Y part thereof in the  
purchase of a Government annuity for and in the name of A for the  
residue of her life and shall retain the remaining sum of £Z

Direction to  
purchase  
annuity.

Direction to invest.

(C) The Trustees shall invest the sum of £Z in  $3\frac{1}{2}\%$  Conversion Stock and shall hold the same in trust to pay the income thereof to A during her life and subject thereto shall hold the same as a security to the Trustees for the due performance of the covenants of indemnity hereinafter contained and subject thereto in trust for B absolutely

Covenant of indemnity.

(D) In consideration of the payments so to be made as aforesaid A and B severally release and for ever discharge the Trustees of and from such part of the settled legacy as shall be so raised and paid by them as aforesaid and the income thereof and they hereby jointly and severally covenant with the Trustees and each of them to save and keep them and each of them and each of their estates and effects harmless and indemnified against all claims demands and proceedings and all costs and expenses made or to be made against or incurred or to be incurred by them or any of them whether at the instance of any person whomsoever by reason or on account of any act thing or payment due or made by the Trustees in pursuance of the directions contained in these presents or otherwise in relation to such parts of the settled legacy as are hereby released and disposed of

Confirmation of power.

(E) Except to the extent aforesaid nothing herein contained shall prejudice or affect the said testamentary power of A in respect of the settled legacy or the estate and interest of B therein in default of or subject to the exercise of such testamentary power.

IN WITNESS *etc.*

#### Form 8.

#### Transfer of Mortgage Debt and Security, the Transferees Paying the Principal Sum received in Unequal Shares (a).

Parties.

THIS TRANSFER OF MORTGAGE is made the — day of — BETWEEN A of *etc.* and B of *etc.* (hereinafter called “the Transferors”) of the one part and C of *etc.* D of *etc.* and E of *etc.* (hereinafter called “the Transferees”) of the other part

Recitals:  
mortgage.

WHEREAS :—

(1) This deed is supplemental to a deed of mortgage (hereinafter called the “Principal Deed”) made this — day of — BETWEEN F of the one part and the Transferors of the other part whereby the said F mortgaged the premises known as — situate at — in favour of the Transferors to secure the principal sum of £A

Agreement to transfer.

(2) The Transferors have agreed at the request of the Transferees to execute such transfer of the principal sum of £A and interest and the securities for the same as is hereinafter contained

Payment of mortgage moneys.

(3) It has been agreed between the Transferees that the said sum of £A shall be paid in manner following namely the sum of £X by the said C the sum of £Y by the said D and the sum of £Z by the said E

NOW THIS DEED WITNESSETH as follows :—

1. In consideration of the said sums of £X £Y and £Z by the Transferees now paid to the Transferors in the proportions and manner aforesaid (the receipt of which several sums making the aggregate sum of £A the Transferors hereby acknowledge) the Transferors

as Mortgagees hereby convey and transfer to the Transferees the benefit of the principal deed.

2. The said sums of £X £Y and £Z and the interest thereon respectively shall have no preference or priority the one over the other and shall be payable rateably and equally out of any moneys which shall be received or realised by the said Transferees their executors administrators or assigns under or by virtue of the Principal Deed and as between the Mortgagor and the Transferees the said principal sum of £A now owing and interest shall be deemed to have been advanced by the Transferees on a joint account.

IN WITNESS *etc.*

### Form 9.

**Assignment by the Widow as Sole Administrator and Beneficiary of a Deceased Partner of all his Share and Interest in the Partnership Assets, in Consideration of the Release of his Estate from all Liabilities in Respect of the Partnership (a).**

THIS ASSIGNMENT made the — day of — BETWEEN A of *etc.* Parties.  
widow (hereinafter called "Mrs. A") of the one part and B of *etc.*  
(hereinafter called the "Assignee") of the other part

WHEREAS :—

(1) A was at the time of his death carrying on the business of — in partnership with the Assignee but no partnership deed had been entered into between the partners the said partnership being carried on in leasehold premises known as — situate at —

(2) The said A (hereinafter called "the Intestate") died intestate on the — day of — and indebted to the said partnership in the sum of £— or thereabouts being excess of drawings above his equal half share in the net profits of the said business

(3) Letters of administration to the estate of the said A were on the — day of — granted out of the — Probate Registry to Mrs. A the widow of the Intestate alone

(4) The estate of the Intestate was valued for probate at less than £1,000 and Mrs. A as his personal representative duly assented to the same vesting in herself beneficially as she doth hereby admit and declare

(5) After payment of or providing for the debts and liabilities of the said partnership the value of the share therein of the Intestate is less than the amount overdrawn by him on the income account and Mrs. A has agreed with the Assignee to assign all that the share estate and interest of the Intestate in the partnership and assets thereof to the Assignee in consideration of the release hereinafter contained

NOW THIS DEED made in pursuance of such agreement and in consideration of the premises WITNESSETH as follows :—

1. Mrs. A as beneficial owner hereby assigns and transfers unto the Assignee ALL that the part or share and beneficial interest whatsoever of him the Intestate of and in ALL AND SINGULAR the assets and goodwill of the said partnership including cash in hand and at the bank and in the said leasehold premises known as — and the proceeds of sale thereof TO HOLD unto the Assignee absolutely.

Recitals :  
partnership  
agreement

death of  
partner  
intestate ;

grant of  
administra-  
tion ;

value of  
estate and  
assent ;

agreement

Assignee  
of intestate  
share in  
partnership  
assets.

Covenants by  
surviving  
partner;  
to pay  
debts;

to indemnify  
Intestate's  
estate.

Mutual  
release.

## 2. The Assignee hereby covenants with Mrs. A

(1) That he the Assignee will in due course pay all the debts and discharge all the liabilities of the said partnership and will at all times hereafter duly pay perform and observe the rents and covenants to be observed and performed in respect of the lease of the said premises known as —

(2) That he the Assignee will at all times hereafter effectually keep indemnified Mrs. A her executors and administrators and her and their estates and effects and the estate and effects of the Intestate against all such debts and liabilities and all actions proceedings costs claims and demands in respect of the said partnership and the said lease.

3. Each of them Mrs. A (in her capacity of beneficial owner and as administrator of the Intestate) and the Assignee hereby releases and for ever discharges the other of them her or his executors or administrators from all actions proceedings claims and demands whatsoever which such respective releasing party or her or his executors or administrators now has or hereafter but for this deed might have had against the other of them her or his executors or administrators on account of the said partnership or anything relating thereto but so nevertheless that this present release shall not prejudice or affect any of the covenants agreements or provisions herein contained or implied or the rights or remedies of Mrs. A or the Assignee their executors administrators or assigns hereunder.

IN WITNESS *etc.*

### Form 10.

#### **Declaration of Trust and Covenant in respect of Partnership Properties Purchased out of Partnership Moneys and Conveyed to One Partner and Subsequently Mortgaged for the Partnership (a).**

Parties.

THIS DEED made the — day of — 19— BETWEEN A of *etc.* of the one part and B of *etc.* of the other part

Recitals:

WHEREAS :—

partnership;

(1) A and B carry on in partnership the business of estate agents at —

purchase of  
properties in  
name of one  
partner;

(2) From time to time during their partnership the freehold properties mentioned in the first part of the Schedule hereto and the leasehold properties mentioned in the second part of the same Schedule were purchased out of partnership moneys provided by A and B in equal shares and were by agreement between A and B conveyed or assigned to A alone

mortgage of  
properties;

(2) By agreement between the parties hereto the said properties were mortgaged by the several deeds specified in the said Schedule to secure the sums therein stated by A at the time the same was

(a) Stamp £1, to be adjudicated. This deed is intended to meet the case where partnership property has been purchased out of partnership moneys and the property conveyed to one partner only and it is desired to have a record that the property belongs to the partnership. In such a case it is advisable to have the property conveyed to the partners and not merely to have a declaration of trust by the partner holding the legal estate. Where such a conveyance is not required, this deed meets the difficulty and records the position. The covenant by the trustee partner to appoint on request his co-partner to be a trustee, will enable his partner to register an estate contract under the Land Charges Act, 1925, s. 10, Class C (iv).

purchased or soon after and the mortgage money was used by A and B for such purchase or for the purposes of their said partnership business

(3) The mortgage interest on each mortgage has been duly provided by A and B in equal shares

payment of mortgage interest; agreement

(4) It is agreed by A and B that the said properties and the proceeds of sale thereof are held by A in trust for himself and B in equal shares as part of their partnership property and that A and B shall give the several undertakings and covenants hereinafter contained.

Now THIS DEED made in pursuance of the said agreement and in consideration of the premises WITNESSETH as follows:—

1. A hereby acknowledges that he holds the properties mentioned in the first and second parts of the Schedule hereto but subject to the respective mortgages affecting the same mentioned in the same Schedule upon trust to sell the same or any one of them with power to postpone sale and to stand possessed of the net proceeds of sale after payment of the costs thereof and of all moneys due on the said mortgages and also of the net rents and profits thereof after payment of all mortgage interest upon trust for A and B as tenants in common in equal shares as part of their partnership property.

Trusts of the property.

2. A hereby covenants with B that he will on request in writing by B forthwith appoint B to be a trustee jointly with himself of these presents and will vest the properties specified in the Schedule hereto in himself and B.

Covenant appoint co-trustee.

3. B hereby covenants with A that he B will duly and punctually pay to A one equal moiety of the interest or any other periodic payment which from time to time will become due and owing under the aforesaid mortgages on the said properties and the said payments shall be held by A upon trust to apply the same in paying the said mortgage liabilities.

Covenant pay mortgage interest.

IN WITNESS etc.

THE SCHEDULE.

PART I.

FREEHOLDS.

| Description of Property. | Particulars of Mortgage. | Amount Secured. |
|--------------------------|--------------------------|-----------------|
|                          |                          |                 |

PART II.

LEASEHOLDS.

| Description of Property. | Particulars of Lease. | Particulars of Mortgage. | Amount Secured. |
|--------------------------|-----------------------|--------------------------|-----------------|
|                          |                       |                          |                 |

## Form 11.

**Settlement upon Mistress and Illegitimate Child for Purpose of Evading the Inheritance (Family Provision) Act, 1938 (a).**

THIS SETTLEMENT is made the — of — 19— BETWEEN A of — of the first part B of — of the second part and C of — and D of — (hereinafter called “the Trustees” which expression shall include their successors in title) of the third part

## WHEREAS :—

(1) By a conveyance bearing even date herewith and executed immediately before this deed A has conveyed unto the Trustees certain real property therein mentioned upon trust to sell the same and to hold the proceeds of sale upon the trusts declared by this deed

(2) A has further transferred to the Trustees the personal property mentioned in the Schedule hereto to be held by them upon the like trusts

(3) A is at present living with B as man and wife and has one child by her namely E

(4) For the consideration hereinafter mentioned (and not in consideration of any future cohabitation between A and B) A desires to make such settlement of the said real and personal property and to enter into such covenants as hereinafter appears.

Now THIS DEED made in pursuance of such desire and in consideration of A's affection for B and for E and of the payment of the sum of £5 by B to A (the receipt whereof A hereby acknowledges) (b) WITNESSETH as follows :—

1. The Trustees shall hold the net proceeds of sale of the said real property upon trust with the consent of A during his life and after his death at their discretion to invest the same in such investments of any nature whatsoever as they shall think fit with power to vary such investments.

2. The Trustees shall have power with the like consent to sell and convert into money the said personal property or any part thereof and to invest the proceeds thereof in the like manner as the proceeds of the said real estate.

3. The Trustees shall hold the said personal property and the proceeds of sale of the said real property and the investments for the time being representing the same (hereinafter called “the Trust Fund”) upon the following trusts.

4. The Trustees shall permit A to enjoy the personal use of such part of the Trust Fund as consists of chattels and shall pay the income of the remaining part thereof to A during his life.

5. After the death of A the Trustees shall hold the Trust Fund in trust for all or such one or more of them namely B E or any relation of

(a) This form was based on a deed by Mr. M. J. Alberty, of Lincoln's Inn. Stamp 10s. and adjudicator stamp. *Ad valorem* duty will be payable on the conveyance and transfers. The purpose of this deed is to evade the provisions of the above Act while retaining the greatest possible control by the settlor over his property.

(b) This consideration is inserted in order to render the covenant to settle after-acquired property enforceable at the suit of B after the death of A. See *Re King's Settlement*, [1939] Ch. 329.

theirs or of A living at the death of A who shall attain the age of twenty-one years in such shares and in such manner generally as A may by deed revocable or irrevocable or by will or codicil appoint.

6. In default of and subject to any appointment the Trustees shall hold the Trust Fund in trust for B during her life if she shall survive A by six months or more and subject thereto in trust for E if he shall attain the age of twenty-one years and if he shall die under that age then in trust for B absolutely.

7. A hereby covenants with the Trustees and as a separate covenant with B that he will at the cost of the Trust Fund duly vest in the Trustees to be held by them upon the trusts hereof all property of any kind to which he may hereafter become entitled (whether in possession or in reversion) PROVIDED ALWAYS that this covenant shall not extend to property derived at a single time from the same source of a less value than £50.

8. The Trustees shall have power at their absolute discretion to advance to A from time to time any moneys forming part of the Trust Fund upon the security only of his personal covenant for repayment.

9. Any trustee being a solicitor or other person engaged in a profession or business may act and be paid for all acts done and time expended in or about the business of the trust including business not of a professional character which might be transacted by such trustee personally.

10. A shall have power during his life at his absolute discretion by deed to remove any of the Trustees hereof and to appoint others but not himself in their place.

11. A shall have power at any time during his life by deed revocable or irrevocable with the consent of the Trustees to revoke all or any of the trusts hereby declared and to declare new trusts in their place.

12. In giving such consent as aforesaid the Trustees shall exercise a judicial discretion and shall consider what new trusts A intends to declare (c).

IN WITNESS *etc.*

#### THE SCHEDULE.

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(c) See *Re Watts*, [1931] 2 Ch. 302, and cf. *Re Phillips*, [1931] 1 Ch. 347. It is desirable to guard against any possible suggestion that A has so complete a power of disposition over the settled property as to make it part of his net estate within the meaning of the Inheritance (Family Provision) Act, 1938.

## Form 12.

**Conveyance by Trustees of an Assent upon Trust for Sale of a Dwelling-house subject to Restrictive Covenants Imposed by Prior Deeds, the Purchaser Covenanting to Indemnify the Vendors (a).**

Parties.

THIS CONVEYANCE made the — day of — 19— BETWEEN A of *etc.* and B of *etc.* (hereinafter called “the Vendors”) of the one part and C of *etc.* (hereinafter called “the Purchaser”) of the other part.

Recitals:

death of  
estate owner  
and grant  
of probate;

## WHEREAS

assent;

1. X late of — who died on the — day of — 19— (being at the date of his death the estate owner in respect of the fee simple absolute in possession free from incumbrances except as hereinafter mentioned of the property hereby assured) duly made his will dated the — day of — 19— and appointed his sons the said A and D (hereinafter called “The Executors”) to be executors thereof which said will was duly proved by the executors on the — day of — 19—.

2. By an Assent dated the — day of — 19— and signed by the executors as personal representatives of the said X the executors assented to the vesting in themselves of *inter alia* the property hereby assured for an estate in fee simple upon trust to sell the respective properties therein mentioned or any part thereof with the consent of Y during her life and afterwards at the discretion of the executors with full power to postpone the sale and to stand possessed of the net proceeds of sale and other moneys applicable as capital and the net rents and profits until sale upon the trusts in the said Assent mentioned.

death of  
Trustee;

3. The said D died on the — day of — 19—.

4. The said Y died on the — day of — 19—.

appointment  
of new  
trustee;

5. By an appointment of a new trustee dated the — day of — 19— and made between the said A of the one part and the said B of the other part the said B was duly appointed to be a trustee of the said Assent in the place of the said D.

agreement  
for sale.

6. The Vendors as trustees of the said Assent and in exercise of the trust for sale therein contained as aforesaid have agreed with the Purchaser for the sale and transfer to him for the sum of £— of the fee simple of the property hereby assured subject to the restrictive covenants and provisions hereinafter referred to (b) [a copy of which restrictive covenants and provisions is set out in the schedule hereto] but otherwise free from incumbrances.

NOW THIS DEED made in pursuance of the said agreement and in consideration of the sum of £— now paid by the Purchaser to the Vendors as such trustees as aforesaid (the receipt whereof the Vendors hereby acknowledge) WITNESSETH as follows:—

Grant.

1. The Vendors as trustees in execution of the trust for sale contained in the said Assent hereby grant unto the Purchaser ALL THAT piece of land situate on the West side of — Road in the Parish and

(a) Stamp *ad valorem*.

(b) If the deeds imposing the restrictive covenants are not handed over, a copy of the covenants should be inserted in the schedule.

Borough of — in the County of — having a frontage of — feet (little more or less) which said piece of land with the dimensions and abuttals thereof is more particularly delineated and described and coloured pink and blue in the plan drawn on an indenture of conveyance dated the — day of — and made between E of the first part, F and G of the second part and H of the third part TOGETHER with the messuage or dwelling-house garage and premises erected thereon and known as — Road aforesaid but not including any easement or implied easement of light or air over the adjoining land now or lately forming part of the Y Estate to HOLD unto the Purchaser in fee simple subject nevertheless first to the restrictive covenants and conditions contained in a certain deed of covenant dated the — day of — 19— and made between the said E of the one part and K of the other part and secondly to the covenants and stipulations contained in the said conveyance of the — day of — 19— or such of the same covenants conditions and stipulations as are still subsisting and capable of taking effect.

2. The (c) Purchaser hereby covenants with the Vendors with the object and intent of affording the Vendors and their representatives and the estate and effects of the said X a full and sufficient indemnity but not further or otherwise that he the Purchaser will at all times hereafter duly perform and observe the restrictive covenants and provisions contained in the said recited deeds dated the — day of — 19— and the — day of — 19— contained in relation to the premises hereby assured and will at all times keep the Vendors and their representatives and the estate and effects of the said X effectually indemnified against all actions proceedings costs charges claims and demands whatsoever in respect of the said restrictive covenants and provisions or any of them.

Covenant  
Indemnity

3. The Vendors hereby acknowledge the right of the Purchaser to the production of the probate of the will of the said X the said Assent of the — day of — and the said Appointment of a new trustee dated the — day of — the possession of which is retained by the Vendors and to the delivery of copies thereof.

Undertak-  
as to prod-  
tion of  
document

4. [Statement as to value if required.]

IN WITNESS etc.

#### THE SCHEDULE.

[To contain a copy of the restrictive covenants.]

(c) This covenant is not required where the vendor's personal liability is limited to breaches of covenant occurring during the continuance of his ownership of the land. This covenant cannot be sued upon unless proceedings to enforce the restrictive covenant have been taken or threatened.

## Form 13.

**Deed of Family Arrangement varying the Trusts of a Will, the Testator's Widow Surrendering her Right to have any Deficiency in her Tax-free Annuity made up out of Corpus and Taking in Exchange a Life Interest in the Whole of the Income of the Residuary Estate (a).**

THIS DEED is made the — day of — 19— between A of *etc.* of the first part B of *etc.* of the second part and C of *etc.* and D of *etc.* (hereinafter called "the Trustees") of the third part.

## WHEREAS

(1) By his will dated the — day of — 19— D (hereinafter called "the Testator") after appointing the Trustees and E to be executors and trustees gave to his wife the said A a legacy of £W and in addition an annuity for and during her life of £x to be paid to her free and clear of income tax out of his personal estate by two half-yearly payments the first payment thereof to be made six months after his death and after certain bequests and gifts of other annuities the Testator gave and bequeathed all his personal estate not therein otherwise disposed of unto his trustees upon trust for sale and conversion and with and out of the moneys produced by such sale and conversion to pay his funeral and testamentary expenses and debts and the legacies and annuities bequeathed by his will or any codicil thereto and the duties upon such legacies and annuities and at the discretion of his trustees to invest the residue of the said moneys as therein mentioned and the Testator declared that the annuities thereby bequeathed and the duties thereon should be primarily payable out of income but that any insufficiency should be made good out of capital and the Testator gave and devised to his trustees all his residuary trust moneys and the investments for the time being representing the same (hereinafter called "his residuary estate") in trust for his son the said B absolutely.

(2) The Testator died on the — day of — 19— and his said

(a) Stamp 10s. Where a testator by his will has charged his residuary estate with the payment of an annuity free of income tax, it not infrequently happens, more especially where the annuity is of a substantial sum and surtax is payable by the annuitant, that the income of the estate is insufficient to meet the annuity even where it is scaled down in accordance with the provisions of s. 25 of the Finance Act, 1941. It is obviously very detrimental to the family fortunes that any deficiency in the income available to pay the annuity should be made good out of capital, as any sums raised out of capital are themselves liable to income tax and surtax under r. 21 of the All Schedules Rules to the Income Tax Act, 1918. Where the annuitant is a member of the family it is frequently possible to come to some arrangement by which recourse to capital is avoided. In the case contemplated by this deed, the testator's widow is entitled to a large annuity, and, subject to the payment of that annuity, the residue goes to the adult child of the marriage absolutely. In such a case, it is frequently a fair arrangement for the annuitant to take all the residuary income and to release the right to a tax-free annuity. This is the scheme adopted in this deed. It means that capital is kept intact, and in the event of the residuary income ever in the future increasing above the sum necessary to defray the annuity the annuitant will take the benefit of such increase. It is not clear, however, that an agreement of this character will not increase the liability to estate duty on the annuitant's death. Ordinarily on the death of the testator's widow, who takes a life interest in his estate, further estate duty is not payable: see Finance Act, 1894, s. 5 (2), as amended by the Finance Act, 1914, s. 14. Where, however, the testator's settled estate has been increased by the release by the widow of a right to a portion of that estate in which she had an absolute interest, the Revenue may claim duty on such increase: *Re Parsons*, [1943] Ch. 12, but see *Re Hall*, [1943] Ch. 140.

will together with a codicil not affecting this deed was duly proved by the Trustees on the — day of — the said E having renounced probate of the said will and not having acted in the trusts thereof.

(3) The income of the residuary estate of the Testator has been and still is insufficient to pay the said annuity of £x free of income tax and the trustees have from time to time raised by sales of capital sufficient sums after payment of tax thereon to provide the balance of the sum of £x free of tax.

deficiency in  
income:

(4) The said A is desirous that recourse should no longer be made to capital to provide the payment of the said annuity of £x free of tax and that as from the — day of — 19— no part of the said annuity should be paid out of capital but that she should receive (after providing for the other annuities bequeathed by the will and codicil of the Testator) only the net income of the Testator's residuary estate that is to say only the sum then representing income of the Testator's residuary estate after the deduction of income tax at the standard rate in force from time to time and without any right to call on the executors to discharge any liability to surtax on the said sum and the said B has agreed to the will being modified in manner aforesaid.

desire of  
annuitant  
stop recourse  
to capital.

Now in consideration of the said A's love and affection for her son the said B and of the provisions hereinafter contained

THIS DEED WITNESSETH and it is HEREBY AGREED and DECLARED as follows:—

1. The words in the will whereby the Testator gave to his wife the said A an annuity for and during her life of £x to be paid to her free and clear of income tax out of his personal estate shall be read and have effect as if the words "but not surtax" had been inserted after the words "income tax".

Modification  
of will.

2. The words in the will whereby the Testator declared that the annuities bequeathed by his said will were to be paid primarily out of income but that any insufficiency was to be made good out of capital shall be read and have effect in relation to the said annuity bequeathed by the Testator to the said A as if the word "primarily" and the words "but any insufficiency shall be made good out of capital" had been deleted.

Release of  
right to  
resort to  
capital.

3. The Trustees shall in every year during the remainder of the life of the said A pay to her in settlement of her claim to the said annuity of £x a sum equal to the amount of the income of the Testator's residuary estate (after providing for the other annuities bequeathed by the will) subject to the deduction therefrom of income tax at the standard rate in force from time to time.

Annuitant  
given income  
of residue

4. Any sums properly payable for income tax or surtax in respect of any payments heretofore made to the said A for or on account of the said annuity of £x shall as far as is necessary be raised and paid by the Trustees out of the capital of the Testator's residuary estate.

Provision  
for payment  
of past  
surtax out  
of capital

IN WITNESS *etc.*

## Form 14.

**Deed of Transfer on Sale by an Absolute Owner of Registered Land of a Half Share in the Land and Proceeds of Sale Thereof (a).**

## H. M. LAND REGISTRY.

## LAND REGISTRATION ACTS, 1925 AND 1936.

District ———.

Title No. ———.

Property ———.

[Date] In consideration of ——— pounds (£——) paid to me by B of *etc.* (the receipt whereof is hereby acknowledged) I A of *etc.* as Beneficial Owner hereby transfer one equal moiety of the said land comprised in the title above referred to or the proceeds of sale thereof to the said B.

We the said A and B hereby apply to the Registrar to be registered as joint proprietors beneficially entitled to an absolute interest in the land comprised in the title above referred to (b) [or (c) we the said A and B hereby apply to the Registrar for the following restriction:—

Except under an Order of the Registrar no disposition is to be registered unless authorised by section 28 of the Law of Property Act 1925 or section 16 of the Trustee Act 1925 and except where a sole proprietor is a trust corporation no disposition under which capital money arises is to be registered unless the money is paid to at least two proprietors.]

[And the parties hereto hereby certify that the transaction hereby effected does not form part of a larger transaction or of a series of transactions of which the amount or value or the aggregate amount or value exceeds £500.]

---

(a) Stamp *ad valorem*.

(b) See the Law of Property Act, 1925, s. 36, as amended by the Law of Property (Amendment) Act, 1926. Where the registered holders take as joint tenants beneficially, being all *sui juris*, they can be registered as the proprietors and no restriction is necessary. The last surviving joint tenant will be able to dispose of the land without appointing a new trustee to join in giving a receipt for the purchase money. Where no restriction is applied for, it is the custom of the Registry to inquire whether the joint tenants are absolutely and beneficially entitled. It is therefore convenient to state this in the transfer so that the position is clear in the first instance.

(c) If the parties are to hold as tenants in common the ordinary restriction must be put on the register.

## Form 15.

Deed of Transfer (Alternative Form) on Sale by an Absolute Owner of Registered Land of a Half Share in the Land and Proceeds of Sale Thereof (a).

H.M. LAND REGISTRY.

Land Registration Acts 1925 and 1936.

District —

Title No. —

Property —

[Date] In consideration of — pounds (£—) paid to me by B of *etc.* (the receipt whereof is hereby acknowledged) I A of *etc.* as Beneficial Owner hereby transfer the said land comprised in the title above referred to myself A and to the said B as joint tenants upon the statutory trust for sale for ourselves as tenants in common in equal shares absolutely.

Pending the sale of the whole of the land hereby transferred pursuant to the said statutory trust for sale the said A and B or other the trustees for sale for the time being shall during the joint lives of the said A and B and the life of the survivor of them and twenty-one years after the death of such survivor have the same full and unrestricted powers (subject to the restriction hereinafter contained) of dealing with or disposing of the said land or any part thereof (whether by way of sale gift transfer charge lease licence or otherwise) for any purpose and in any manner in all respects as a sole absolute proprietor thereof.

We the said A and B hereby apply to the Registrar for the following restriction:—

Except under an Order of the Registrar no disposition is to be registered unless authorised by section 28 of the Law of Property Act 1925 or section 16 of the Trustee Act 1925 and except where a sole proprietor is a trust corporation no disposition under which capital money arises is to be registered unless the money is paid to at least two proprietors.

[And the parties hereto hereby certify that the transaction hereby effected does not form part of a larger transaction or of a series of transactions of which the amount or value or the aggregate amount or value exceeds £500.]

---

(a) This is an alternative form to Form 15, *ante*, p. 288. A subscriber has written pointing out that Form 15 contains no transfer of the legal estate and suggesting that, having regard to the fact that a legal estate cannot subsist in an undivided share in land, the transfer of a moiety of the property is ineffective. While not agreeing with this view, we publish the above form as an alternative.

## Form 16.

**Deed of Appointment of New Trustee where, Prior to January 1, 1926, a person of Full Age and an Infant were Entitled to Land in Undivided Shares (a).**

Parties.

THIS DEED OF APPOINTMENT is made the — day of — 19— BETWEEN A B of *etc.* (hereinafter called “the Appointor”) C D of — of the second part and the Appointor and the said C D of the third part.

Recitals:

WHEREAS:—

tenancy in common before 1926;

(1) Immediately before the commencement of the Law of Property Act 1925 the property described in the Schedule hereto was beneficially held at law for an estate in fee simple in possession free from incumbrances by the Appointor and C D as tenants in common in [equal] shares

infant attains full age;

(2) On the first day of January 1926 C D was not of full age but attained the age of twenty-one years on the — day of —

doubts of the effect of transitional provisions;

(3) Doubts have arisen whether by virtue of the transitional provisions of the said Law of Property Act 1925 the entirety of the legal estate in the said property became vested in the Appointor under or by virtue of Part III of the First Schedule of the said Act or whether the same became vested in the Public Trustee under or by virtue of Part IV of the said First Schedule of the said Act but in either case the entirety of the legal estate of the said property is now held upon the statutory trusts for sale created by the said transitional provisions or otherwise under or by virtue of the said Act.

Public Trustee not requested to act.

(4) The Public Trustee has not been requested to act in the said trusts and the Appointor and C D being together interested in the whole [more than half] of the income of the said property are desirous of appointing a new trustee in the place of the Public Trustee if and so far as the entirety of the legal estate shall be vested in him

(5) The Appointor and C D are desirous that C D shall be appointed trustee of the said statutory trusts for sale to act jointly with the Appointor.

Now in pursuance of the premises THIS DEED WITNESSETH as follows:—

Appointment of person in place of Public Trustee

1. If and so far as the entirety of the legal estate in the said property is vested in the Public Trustee as aforesaid the Appointor and C D in exercise of the power for this purpose conferred upon them by the Law of Property Act 1925 and of any and every other power then hereunto enabling do hereby appoint the Appointor and C D to be trustees of the said property upon the said statutory trusts for sale in place of the Public Trustee.

Appointment to act jointly with person of full age.

2. If and so far as the entirety of the legal estate in the said property is vested in the Appointor as aforesaid the Appointor in exercise of the power conferred upon him by the Trustee Act 1925

(a) Stamp 10s. The appointment must be by deed to incorporate the vesting declaration under the Trustee Act, 1925; see the purpose of this form, *ante*, p. 102.

and of any and every other power him hereunto enabling hereby appoints C D to be a trustee of the said property and to act jointly with the Appointor for all the purposes of the said statutory trusts for sale.

[3. The proceeds of sale are now held in trust for the Appointor and C D in the following shares : —.]

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

Form 17.

**Trust Deed Declaring Purposes where Money has been Raised for the Benefit of Men and Women of a Particular Locality Serving with the Forces (a).**

THIS TRUST DEED is made the — day of — 19— by A B of *etc.* Parties.  
C D of *etc.* and E F of *etc.* (hereinafter called "the Trustees" which expression shall be deemed to include the Trustees for the time being of the trusts hereinafter declared).

WHEREAS :—

A. The Trustees have in their hands certain moneys arising from collection subscription or otherwise howsoever to be held for the purposes hereinafter declared and other sums may hereafter be received by them for the same purposes. Recitals:  
moneys in the hands of trustee

[B. The Trustees stand possessed of certain National Savings Certificates [*here add any other form of savings or investments resulting from collections etc.*] received or to be received by them or purchased by them out of moneys received on behalf of such purposes.] investment in hands of trustees;

C. The Trustees are desirous of declaring more fully the trusts upon which such sums of money [and investments] now in their hands or hereafter to come into their hands shall be held. desirous of declaring trust.

Now in consideration of the premises THIS DEED WITNESSETH as follows :—

1. The Trustees shall hold all such moneys as aforesaid UPON TRUST to invest the same in Government Securities and without limiting the generality of this power more especially to invest in Government Securities issued in connection with War Savings with power in their absolute discretion to vary the said investments and to stand possessed of such investments and any income arising therefrom upon the beneficial trusts hereinafter declared. Trust to invest mon

2. The Trustees shall stand possessed of all such investments as aforesaid UPON TRUST to sell call in and convert into money such investments as are not Government Securities and to invest the proceeds of such sale calling in and conversion in Government Securities and to stand possessed of all investments of whatsoever nature and any income arising therefrom upon the beneficial interests hereinafter declared. Unauthorised investment held on trust for sale.

3. Until the end of the war but not so as to exceed twenty-one years from the date hereof the income arising from any such investments shall Income to be accumulated till end of war.

(a) Such a charity must be registered under the War Charities Act or obtain exemption from registration. In a case such as that envisaged by this deed exemption is not likely.

be accumulated and invested in manner hereinbefore provided for moneys now in the hands of the Trustees and the investments so made shall be held upon the beneficial trusts hereinafter declared.

Capital to be divided.

4. At the end of the war or the expiration of twenty-one years from the date hereof if the war shall not have sooner ended the Trustees shall subject as hereinafter provided realise the said Government Securities and any other investments then held upon the trusts hereof and shall distribute the proceeds of such realisation equally between the beneficiaries but no person shall be a beneficiary unless he shall have been ordinarily resident for a period of not less than — months prior to the 3rd day of September 1939 in the parish [Urban District *etc.*] of —.

Death of any beneficiary.

5. A beneficiary's rights under these trusts are contingent upon his surviving until the end of the war but the Trustees in their discretion may in the case of any person who has died during the war pay or transfer to either the personal representatives or to a parent wife or child or children of such person the share which such person would have had if such person had survived the end of the war.

Discretionary trusts of beneficiary's share.

6. The Trustees in their absolute discretion may :—

- (a) pay or transfer the share of any beneficiary to the father mother wife or child or children of the beneficiary or one or more of them for his her or their own use and benefit
- (b) pay or transfer the share of any beneficiary to Trustees to hold upon such trusts as they direct for the benefit of the beneficiary or any one or more of the persons mentioned in paragraph (a) of this clause
- (c) pay or transfer any share of any beneficiary either in cash or in securities or partly in cash and partly in securities and the decision of the Trustees concerning the value of any security at the date of such transfer as aforesaid shall be conclusive.

Determination of beneficiaries.

[7. Within three months after the end of the war the Trustees shall advertise by [3] consecutive insertions in — requiring any persons claiming to be beneficiaries under the trusts hereof and no person shall be entitled to any claim against the trust fund unless written notice has been left by him or on his behalf at the address named in such advertisement within the period therein stated, such period being not less than — clear days.]

Trustees' decision final.

8. The decision of the Trustees concerning the claim of any person to be a beneficiary shall be final and conclusive and the Trustees shall not be responsible for any error or omission in determining any such claim as aforesaid or in determining the amount or share of any beneficiary under the trusts hereof.

Powers exercisable by majority of trustees.

9. Any of the powers and authorities hereby granted to or vested in the Trustees may at any time be exercised by a majority of the Trustees without the concurrence or with merely the formal concurrence of any trustee and any trustee who shall dissent from any exercise of any such powers or authorities shall nevertheless concur in executing or signing any document or doing any act necessary for giving effect to the exercise of any such powers or authorities by the majority of the Trustees without being responsible for loss.

10. The following expressions shall in this deed where the context so admits or requires have the meanings following, that is to say :—

“Beneficiary” includes any person male or female who shall for the period of — months have served on board any ship registered in the United Kingdom or for a like period have served in any one or more of the Armed Forces of the Crown including all women’s services and nursing services attached thereto but excluding the Home Guard and excluding any person who shall have been dismissed from any such service by sentence of court martial. “The end of the war” means the day after the date on which the formal surrender of the last of the armies of Japan or Germany whichever shall last happen shall have been accepted by the commander of the Allied Forces opposed to such army, but the decision of the Trustees on this date shall be conclusive and they shall not be responsible for any loss occurring through any error made in this date (b).

Definition

Form 18.

Conveyance or Assignment of a Cinema (a).

THIS [CONVEYANCE] [ASSIGNMENT] is made the — day of — 19— BETWEEN A. B. Ltd. whose Registered Office is situate at — in the County of — (hereinafter called “the Vendor Company”) of the one part and G. H. Ltd. whose Registered Office is situate at — in the County of — (hereinafter called “the Purchaser Company”) of the other part

WHEREAS :—

(i) [The Vendor Company is seised in fee simple absolute in possession [subject to the [restrictive covenants and stipulations] [and the] [tenancy] [tenancies] hereinafter referred to but otherwise] free from incumbrances of the piece[s] of land with the Cinematograph Theatre [shop(s)] [Café] [and other buildings and erections] thereon or on some part or parts thereof hereinafter described and intended to be hereby conveyed] [The Vendor Company is possessed [subject to the [tenancy] [tenancies] hereinafter referred to but otherwise] free from incumbrances of the leasehold land with the Cinematograph Theatre [shop(s)] [Café] [and other buildings and erections] thereon or on some part or parts thereof which is shortly described in the fourth column of the [—] Schedule hereto and is held by the Vendor Company for the residue remaining unexpired of the term of years created by the Lease (hereinafter called “the Lease”) short particulars whereof are set forth in the first second and third columns of the said [—] Schedule]

(ii) The Vendor Company is also the owner of the business of Cinematograph Theatre Proprietors now carried on by the Vendor

(b) The end of the war could be defined by reference to the Validation of Wartime Leases Act (*ante*, p. 10), but probably the date fixed for the end of the war may be too remote or otherwise unsuitable for a trust such as this.

(a) This form was drafted by Mr. L. E. Coleman. It is intended to follow Form 5 in this volume.

Company upon the said [freehold] [leasehold] property (hereinafter called "the Cinema property") and is the absolute owner of the plant machinery [(including the typewriter(s))] office theatre and other furniture seating curtains carpets and furnishings [organ] fixtures fittings cinematograph apparatus and screen engines batteries switches electrical and other installations equipment utensils chattels spare parts spare furnishings goods effects and things [(except the [Sound Reproducing equipment] [and the] [automatic ticket issuing machines] which [respectively] [are] [is] the subject of the [Lease(s)] [and] [Agreement(s)] referred to in item(s) No(s) — [and —] of the [—] Schedule hereto)] on in or about the Cinema property or used or for use in connection therewith as part of the assets of the said business and is also entitled in connection with the said business (b) to the benefit and advantage of the Licences and forward trade contracts and engagements (including contracts or agreements for film hire) hereinafter mentioned

[(iii) The Vendor Company is also entitled as hirer to the benefit of the Agreement for Hire with option to purchase (hereinafter called "the Hire Purchase Agreement") short particulars whereof are set forth in the [—] Schedule hereto]

(iv) The Vendor Company has agreed with the Purchaser Company for the sale to the Purchaser Company of the Cinema property with the goodwill of the said business the said plant machinery office theatre and other furniture seating curtains carpets and furnishings [organ] fixtures fittings cinematograph apparatus and screen engines batteries switches electrical and other installations equipment utensils chattels spare parts spare furnishings goods effects and things [(except as aforesaid)] and the full benefit and advantage (so far as the Vendor Company are able to transfer or assign the same and subject to all the outstanding liabilities and obligations of the Vendor Company thereunder respectively) of the said Licences and trade contracts and engagements [and of the Hire Purchase Agreement] together with the other assets and rights hereinafter mentioned [but subject to the said [restrictive covenants and stipulations] [and the] [said] [tenancy] [tenancies] [and also to the Agreement hereinafter mentioned in regard to the Canopy of the Cinema property]] at the price of £—— of which £—— has for the purposes of Stamp Duty been ascertained and apportioned as the price of the loose plant equipment goods effects and things the title to which passes by delivery and are not intended to be affected by this deed (c) and £—— as the price of the property hereby [conveyed] [assigned]

NOW THIS DEED made in pursuance of the said agreement and in consideration of the sum of £—— now paid by the Purchaser Company

(b) In the case of trade contracts where the Vendor Company is entitled through a nominee or nominees such person or persons must join in this deed and (by the direction of the Vendor Company) assign the benefit of the contracts vested in him or them or alternatively such contracts can be made the subject of a separate Assignment which would normally attract a stamp of 10s., or if made for a nominal consideration of, say, £5, a stamp of 1s. only. If the nominee is a company, and the contracts are of any value, then notwithstanding that the Vendor Company controls such company, a consideration is desirable, as a company has no power to give away its assets, even at the request of its controlling shareholders.

(c) The Purchaser Company should obtain from the Vendor Company on completion a separate receipt over a 2d. stamp for the consideration money for the loose plant, etc.

to the Vendor Company (the receipt whereof the Vendor Company hereby acknowledges) WITNESSETH as follows :—

1. THE Vendor Company as Beneficial Owner hereby [conveys] [assigns] unto the Purchaser Company the Cinema property that is to say [ALL THAT — together with the Cinematograph Theatre known as “The —” [— shop(s)] [Café] [Car Park] [and cycle shed and racks] erected [or laid out] thereon or on some part or parts thereof and the outbuildings belonging thereto] [ALL THAT the land and buildings comprised in and demised by the Lease] [And] [together with the fixtures fittings machinery and equipment fixed to the said property] (d) TO HOLD the same unto the Purchaser Company [in fee simple [subject to the restrictive covenants and stipulations contained or referred to in the deeds and documents short particulars whereof are set forth in the [—] Schedule hereto] ] [for all the residue now unexpired of the term of years granted by the Lease subject henceforth to the payment of the rent thereby reserved and to the covenants agreements and conditions therein contained and on the part of the lessee to be performed and observed] [and subject also to but with the benefit of [(i)] the [tenancy] [tenancies] of the said [shop(s)] [and] [Café] under the [Lease(s)] [Tenancy Agreement(s)] short particulars whereof are set forth in the [—] Schedule hereto [and (ii) An Agreement dated the — day of — 19— and made between — and — relating to the erection and maintenance of the Canopy which overhangs the public footway on the — Street frontage of the Cinema property and the liabilities and obligations of the Vendor Company thereunder] ].

2. The Vendor Company [as Beneficial Owner] (e) hereby assigns unto the Purchaser Company :—

(a) All That the beneficial interest goodwill and connection of the Vendor Company of and in the said business of Cinematograph Theatre proprietors now carried on by the Vendor Company upon the Cinema property or upon some part or parts thereof

(b) All That the benefit (so far as the Vendor Company can transfer or assign the same and subject to all the liabilities and obligations of the Vendor Company thereunder) of all Licences held by the Vendor Company (f) for or in connection with the Cinema property and/or the said business short particulars of which Licences are set forth in the [—] Schedule hereto

(c) All That the full benefit and advantage as from the date hereof (so far as the Vendor Company can transfer or assign the same and subject to all the liabilities and obligations of the Vendor Company thereunder) of and (so far as the Vendor Company can grant the same)

(d) These words are probably not strictly necessary but they do no harm.

(e) The Vendor Company may be unwilling to give covenants for title in relation to all the items in this clause in which event these words should be omitted here and inserted at the commencement of such of the specific items as the parties may agree justify the covenants.

(f) See note (b), *ante*, p. 294. As, however, a formal transfer of the licences by the Licensing Authority is necessary it is doubtful whether there is any point in joining a nominee holder in this deed for the purposes of this sub-clause. Where the Vendor Company itself holds all the licences the sub-clause can be included for what it is worth, but where the licences are held by a nominee it will normally be sufficient if the Purchaser Company satisfies itself on completion that the provisions of clause 22 of Form 5 (see note (a), *ante*, p. 262) have been or will be complied with.

the right for the Purchaser Company or its successors in title and assigns to enforce (g) or otherwise deal with

(i) all the forward trade contracts and engagements to which the Vendor Company are entitled in connection with the Cinema property and/or the said business short particulars of which contracts and engagements are set forth in [Part I of] the [—] Schedule hereto (h)

(ii) all the forward contracts or agreements entered into by the Vendor Company in the ordinary course of business for the booking or renting of films for exhibition in the said Cinematograph Theatre subsisting at the date hereof and still to be performed [short particulars of which contracts or agreements are set forth in Part II of the — Schedule hereto] (i)

(d) All That the exclusive right (so far as the Vendor Company can grant the same) to the use of the name “—” in connection with the Cinema property and the said business and also [the trade mark No. — Registered on the — day of — in Class — in respect of — (k) and] all other trade names and other like rights whatsoever connected with the Cinema property and the said business and the right to represent the Purchaser Company as carrying on the Cinema property and the said business in continuation of the Vendor Company and in succession thereto

[(e) All That the benefit (so far as the Vendor Company can transfer or assign the same and subject to all the outstanding liabilities and obligations of the Vendor Company thereunder) of the Hire Purchase Agreement and also the benefit of all payments made by the Vendor Company prior to the date hereof under the terms of the Hire Purchase Agreement] (l)

(f) All other property (not passing or capable of passing by

(g) The Purchaser Company's solicitors should satisfy themselves before contract whether there is likely to be any difficulty in regard to the assignment to the Purchaser Company of the benefit of the trade contracts, etc. If there is difficulty and it cannot be overcome the Vendor Company must agree to make arrangements to terminate on completion the contracts affected and the Purchaser Company must arrange for any necessary new contracts as from completion. Alternatively, it may be possible to get over the difficulty by inserting in this deed a provision entitling the Purchaser Company to enforce or otherwise deal with the contracts as the attorney of the Vendor Company. As a general rule, however, provided the Purchaser Company is reasonably substantial the interested parties will either agree to the benefit of the Vendor Company's subsisting trade contracts being assigned to the Purchaser Company or will agree to terminate such contracts on completion and enter into fresh ones with the Purchaser Company.

(h) See the latter part of clause 5 (a) of Form 5, referred to in note (a), *ante*, p. 264. It may be necessary to include in the agreements to be specified in [Part I of] the [—] Schedule particulars of leases or hire agreements relating to equipment, and in such event, if there are any leases, any necessary reference to the terms thereof must be made in the habendum at the end of this clause in the usual way.

(i) In view of the provisions of clauses 1 (f) and 17 (v) of Form 5 referred to in note (a), *ante*, p. 262, it is not essential to schedule the film hire contracts to this deed, and as there may be a large number of them (especially if the theatre plays “3-day” films and also opens on Sundays) and details will already be in the possession of the Purchaser Company they will usually be omitted.

(k) It is unlikely that there will be a registered trade mark or marks, but if there are these words must be included and this deed must be registered under the Trade Marks Acts in the usual way.

(l) See note (m) to Form 5, referred to in note (a), *ante*, p. 270. It will not be necessary to have this sub-clause and the third recital or the references to the hire purchase agreement which are contained in the fourth recital and in clause 4 (b) if the owners of the equipment which is the subject-matter of the hire purchase agreement have already provided a printed form of assignment which covers all necessary points.

manual delivery [and not being the equipment which is the subject of the [Lease(s)] [and] [Agreement(s)] referred to in item(s) No(s) — [and —] of the [—] Schedule hereto] ) on the Cinema property at the date hereof (m)

to HOLD the same unto the Purchaser Company absolutely.

[3. The covenants implied under Section 77 (1) (c) of the Law of Property Act 1925 shall be deemed to be incorporated herein.]

4. The Purchaser Company for itself and its successors in title and assigns (n) hereby covenants with the Vendor Company that the Purchaser Company :—

[(a) will at all times hereafter duly observe and perform the hereinbefore mentioned restrictive covenants and stipulations and will keep the Vendor Company effectually indemnified from and against all actions proceedings costs charges claims demands and expenses whatsoever in respect of any breach thereof arising after the date hereof [Provided always that the foregoing covenant shall be by way of indemnity only] ] (o)

(b) will duly pay satisfy discharge fulfil perform observe and carry out all the liabilities covenants and obligations of the Vendor Company (p) subsisting at the date hereof in relation to (i) the forward trade contracts and engagements of the Vendor Company hereinbefore referred to and specified in [Part I of] the [—] Schedule hereto [and] (ii) the forward contracts and agreements of the Vendor Company for the booking or renting of films hereinbefore referred to [and specified in Part II of the [—] Schedule hereto] (q) [and] [(iii) the Hire Purchase Agreement] [and (iv) the [Lease(s)] [and] [Tenancy Agreement(s)] [and Canopy Agreement] [respectively hereinbefore referred to] and on the part of the Vendor Company to be paid satisfied discharged fulfilled performed observed and carried out and will at all times hereafter keep the Vendor Company effectually indemnified from and against all actions proceedings costs charges claims demands and expenses whatsoever in respect of any breach of any of such liabilities covenants and obligations arising after the date hereof

(c) will not during the period of — years from the — day of — 19— (r) either itself or through any Subsidiary or Associated Company or jointly with or as agents for any person firm or Company carry on or be (either directly or indirectly) in any way engaged concerned or interested in the

(m) This sub-clause is probably not strictly necessary, but it is inserted *ex abundanti cautela*.

(n) It is necessary to have the reference to successors and assigns notwithstanding s. 78 of the Law of Property Act, 1925, because all the covenants do not relate to land.

(o) If the Vendor Company will not remain liable after completion in respect of the restrictive covenants and stipulations then this covenant will not, of course, be required at all.

(p) This covenant will not be extended to indemnify any nominees unless they join in this deed.

(q) See note (i), *ante*, p. 296.

(r) This will be the date of the contract for sale and purchase of the cinema.

business of Cinematograph Theatre proprietors within a radius of — miles from the Cinema property.

IN WITNESS *etc.*

THE [ — ] SCHEDULE ABOVE REFERRED TO.

| <i>Date.</i> | <i>Parties.</i> | <i>Term and Rent.</i> | <i>Short description of property demised.</i> |
|--------------|-----------------|-----------------------|-----------------------------------------------|
|--------------|-----------------|-----------------------|-----------------------------------------------|

[Here insert, if the Cinema property is of leasehold tenure, particulars of the Lease, in accordance with the first recital of this form.]

THE [ — ] SCHEDULE ABOVE REFERRED TO.

| <i>Date.</i> | <i>Parties.</i> | <i>Short particulars of equipment or apparatus under hire with option to purchase.</i> | <i>Total amount due in respect of all payments interest etc.</i> | <i>Total amount paid up to the date of this deed.</i> |
|--------------|-----------------|----------------------------------------------------------------------------------------|------------------------------------------------------------------|-------------------------------------------------------|
|--------------|-----------------|----------------------------------------------------------------------------------------|------------------------------------------------------------------|-------------------------------------------------------|

[Here insert particulars of the Hire Purchase Agreement if one is included in the sale.]

THE [ — ] SCHEDULE ABOVE REFERRED TO.

| <i>[Date.</i> | <i>Description.</i> | <i>Parties.]</i> |
|---------------|---------------------|------------------|
|---------------|---------------------|------------------|

[Here insert, if the Cinema property is of freehold tenure, and is subject to restrictive covenants and stipulations, a list of the deeds and documents containing such restrictive covenants and stipulations or alternatively a copy of such covenants and stipulations.]

THE [ — ] SCHEDULE ABOVE REFERRED TO.

| <i>Date.</i> | <i>Description.</i> | <i>Parties.</i> | <i>Term and Rent.</i> | <i>Short description of property let.</i> |
|--------------|---------------------|-----------------|-----------------------|-------------------------------------------|
|--------------|---------------------|-----------------|-----------------------|-------------------------------------------|

[Here insert particulars of the Lease(s) and/or Tenancy Agreement(s) (if any) to which the shop(s) and/or Café (if any) are subject.]

THE [ — ] SCHEDULE ABOVE REFERRED TO.

| <i>[Date.</i> | <i>Description.</i> | <i>Parties.]</i> |
|---------------|---------------------|------------------|
|---------------|---------------------|------------------|

[Here insert particulars of all subsisting Licences.]

THE [ — ] SCHEDULE ABOVE REFERRED TO.

[PART I.]

| <i>Date.</i> | <i>Parties.</i> | <i>Subject-matter of Agreement.</i> |
|--------------|-----------------|-------------------------------------|
|--------------|-----------------|-------------------------------------|

[Here insert particulars of Trade Contracts (other than for film hire) numbering each document if necessary for the purposes of recital (ii) and Clause 2 (f).]

[PART II.

Playing date and  
number of days.

Name of  
Film.

Name of  
Renter.

Price.]

[Here insert particulars of Film Hire Contracts if it is desired to schedule them.]

Form 19.

Option to a Vendor to Repurchase the Property at an Enhanced Price within a Specified Time (a).

THIS AGREEMENT is made the — day of — 19— BETWEEN A Parties.  
of *etc.* of the one part and B of *etc.* of the other part.

WHEREAS the freehold premises known as — situate at — Recitals:  
in the County of — were recently put up for sale by auction by X Agreement  
and B was the purchaser thereof all which premises are more particularly delineated in the plan annexed hereto and thereon coloured to purchase  
pink.

AND WHEREAS before completion of the said sale B agreed to Agreement  
transfer the benefit of the said agreement to purchase the said property for sub-s  
to A upon A paying the sum of £Y and granting to B an  
option to repurchase the said property upon the terms hereinafter  
contained

AND WHEREAS A duly paid the said sum of £Y and by a convey- Conveyan  
ance made the — day of — 19— between the said X of the first to vendor  
part B of the second part and A of the third part the said property  
was duly conveyed to A for an estate in fee simple free from  
incumbrances.

NOW IN PURSUANCE OF THE PREMISES IT IS HEREBY AGREED AS follows :—

1. IF B shall on or before the — day of — next give to A Grant of  
at — notice in writing of his desire to purchase the fee simple of option to  
the said property then A shall on or before the expiration of six weeks purchase  
from the service of such notice and upon payment of the sum of  
£Y + Z assure to B or as he may direct the said property for an  
estate in fee simple free from incumbrances.

2. THE title of A prior to the said conveyance dated the — day Provision  
of — 19— to A shall not be investigated by B but shall be deemed as to titl  
to be approved and accepted by him and he shall take no objection  
and make no requisition in respect of the said conveyance to A.

3. THE sale to B shall be upon the like terms and conditions and Terms of  
subject to the like provisions as are contained in the particulars and sale.  
conditions of sale of the property on the original sale by auction to  
B and the said particulars and conditions of sale shall be deemed to  
be incorporated herein so far as they are applicable to a sale by  
private contract and are not varied by this agreement.

AS WITNESS *etc.*

(a) Stamp 6d. This option should be registered as an estate contract under the Land Charges Act, 1925, s. 10, Class C (iv).

## Form 20.

**Conveyance of Freeholds by a Mortgagee in the name of the Mortgagor under a Power of Attorney in a Memorandum of Deposit.**

THIS CONVEYANCE is made the — day of — 19— BETWEEN A of *etc.* (hereinafter called the Borrower) of the first part B of *etc.* (hereinafter called the Vendor) of the second part and C of *etc.* (hereinafter called the Purchaser) of the third part

WHEREAS :—

(1) By a Memorandum of Agreement under seal (hereinafter called the Memo.) dated *etc.* the Borrower charged all his estate and interest in the property hereby assured (the documents of title relating to which had been deposited with the Vendor) with the payment to the Vendor of the sum of £— with interest thereon after the rate of £— per cent. per annum on a day now past AND thereby irrevocably appointed the Vendor to be his attorney for him and in his name or otherwise to execute any deed assurance or act which might be required or deemed proper on any sale of the said property under the statutory power of sale applicable thereto in order to vest the legal estate therein in the purchaser or purchasers .

(2) By an Order of the Chancery Division of the High Court of Justice made on the — day of — In the Matter of the Courts (Emergency Powers) Act 1943 and In the Matter of the Memo. B v. A 19— B No. — it was ordered that the Vendor be at liberty to proceed to exercise his remedies as a mortgagee under the Memo. by way of sale

(3) The Vendor in exercise of the power conferred on him by the Memo. and the statute in that behalf has agreed with the Purchaser for the sale to him of the estate in fee simple in the said property free from incumbrances for the sum of £— and it has been agreed that the Vendor shall execute these presents as well in the name of the Borrower under the said power of attorney as in his own name.

NOW THIS DEED WITNESSETH that in pursuance of the said agreement and in consideration of the sum of £— on or before the execution of these presents paid by the Purchaser to the Vendor (the receipt and payment of which sum the Vendor hereby acknowledges) the BORROWER AS BENEFICIAL OWNER hereby conveys and the Vendor AS MORTGAGEE in exercise of the power vested in him by the Memo. and the Statute in that behalf and of every other power him enabling hereby releases unto the Purchaser ALL THAT *etc.* TO HOLD unto the Purchaser in fee simple free from all right or equity of redemption under and all principal money and interest secured by and all claims and demands under the Memo. (a).

[Declaration as to value if required.]

[Acknowledgment of right to production of deeds.]

IN WITNESS *etc.*

(a) The vendor will execute in his own name and in the name of the borrower under the power. This form will only be applicable where the memorandum of agreement is under seal. If it is not, it will be necessary for the vendor to apply to the Court for an order for sale and directing the borrower to convey the legal estate.

Form 21.

**Conveyance of Freeholds by a Mortgagee under a Memorandum of Deposit containing a Declaration of Trust of the Legal Estate.**

THIS CONVEYANCE is made the — day of — 19— BETWEEN Parties  
A of *etc.* (hereinafter called the Vendor) of the first part B of *etc.*  
(hereinafter called the Trustee) of the second part and C of  
*etc.* (hereinafter called the Purchaser) of the third part.

WHEREAS :—

(1) By a Memorandum under seal (hereinafter called the Memo.)  
dated the — day of — 19— and made by D (hereinafter called  
the Borrower) the Borrower declared that he had deposited the docu-  
ments of title relating to the property hereby assured as security for  
and thereby charged all the said property with the payment to the  
Vendor of the sum of £— with interest thereon after the rate of  
£— per cent. per annum on a day now past and thereby undertook  
that he or his personal representatives and all other necessary parties  
(if any) would whenever required at his or their own cost execute and  
deliver to the Vendor an effectual legal mortgage of the said property  
AND that the Borrower his executors administrators and assigns would  
in the meantime until such mortgage was executed stand seised in pos-  
session of the said property in trust for the Vendor and his assigns  
subject to the equity of redemption subsisting therein under the Memo.  
and that the Vendor might appoint a new trustee or trustees in the  
place of the Borrower or of any trustees appointed under the power  
now in recital as if the Borrower were dead

(2) [Order under Courts (Emergency Powers) Act]

(3) The Vendor in exercise of the power conferred on him by the  
Memo. and the statute in that behalf has agreed with the Purchaser  
for the sale to him of the estate in fee simple in possession in the said  
property free from incumbrances for the sum of £— and upon the  
treaty for the said sale it was agreed that the Vendor should appoint  
the Trustee to be a trustee of the said property in the place of the  
Borrower and that the same should be vested in the Trustee accord-  
ingly and that the Trustee should concur in these presents in manner  
hereinafter appearing.

NOW THIS DEED WITNESSETH as follows :—

1. In pursuance of the said agreement and in exercise of the power  
in that behalf conferred on him by the Memo. and of every other  
power him enabling the Vendor hereby appoints the Trustee to be a  
trustee of the Memo. in the place of the Borrower for all the purposes  
thereof.

2. In exercise of the power in that behalf in the Trustee Act 1925  
the Vendor hereby declares that the said property shall vest in the  
Trustee for all the estate and interest subject to the trusts declared  
by the Memo. upon the trusts applicable thereto by virtue of the  
Memo.

3. In further pursuance of the said agreement and in consideration  
of the sum of £— on or before the execution of these presents paid  
by the Purchaser to the Vendor (the receipt and payment of which  
sum the Vendor hereby acknowledges) the Trustee AS TRUSTEE by

Recitals:  
memoran  
of charge

agreemen  
for sale  
appointm  
of trustee  
convey le  
estate.

Appointm  
of trustee

Vesting  
declarati

Conveyan

the direction of the Vendor hereby conveys and the Vendor AS MORTGAGEE in exercise of the power vested in him by virtue of the Memo. and the Statute in that behalf and of every other power him enabling hereby releases unto the Purchaser ALL THAT *etc.* TO HOLD unto the Purchaser in fee simple free from all right or equity of redemption under and all principal money and interest secured by and all claims and demands under the Memo.

[4. Declaration as to value (if required).]

[5. Acknowledgment of right to production of documents.]

IN WITNESS *etc.*

#### Form 22.

### Conveyance of Freeholds by a Bank under a Power of Attorney in a Memorandum of Deposit, the Legal Estate being Conveyed by the Attorney in his own Name (a).

THIS CONVEYANCE is made the — day of — 19— BETWEEN A's Bank Limited whose registered office is situate at — in the County of — (hereinafter called the Bank) of the first part B of *etc.* of the second part and C of *etc.* (hereinafter called the Purchaser) of the third part

WHEREAS :—

(1) By a Memorandum of Agreement under seal (hereinafter called the Memo.) dated the — day of — 19— D (hereinafter

(a) A bank would, it is conceived, usually be reluctant to take out letters of administration as a creditor to the estate of the mortgagor, particularly if the estate is likely to prove insolvent. Further, if the security is insufficient, it might be said that if the bank were to sell as personal representative and pay the whole of the purchase money to itself as mortgagee, in satisfaction of the mortgage debt, it was not selling as personal representative at all, but was in substance exercising its power of sale as mortgagee, and that the transaction was open to objection as being a device to evade the Courts (Emergency Powers) Act, 1943. There may not be assets available out of which the bank can as personal representative pay off its charge without selling. If the memorandum of charge contains a declaration of trust, it is preferable in the circumstances contemplated by this Precedent to make use of such declaration and convey as in the last Precedent. The bank could appoint a new trustee in the place of the mortgagor, notwithstanding that under s. 9 of the Administration of Estates Act, 1925, the legal estate is vested in the Probate Judge. The latter would not be a necessary party to the appointment and consequent vesting declaration. Nor would it be necessary to remove him from the trusteeship, even if the power provides for removal of the mortgagor and his successors. Similarly the appointment would be good even if, unknown to the bank, representation had in fact been granted, since the personal representatives of a sole trustee are not trustees for this purpose: see *Re Routledge*, [1909] 1 Ch. 280. If the memorandum contains a power of attorney, the power will under s. 123 of the Law of Property Act, 1925, being given for value, not be revoked by the mortgagor's death, and any act done under it will be valid even if the purchaser has notice of his death. The only difficulty is the manner in which the power is to be exercised. Under s. 123 (1) an attorney can execute deeds in his own name. This, however, is subject to any statutory direction that an instrument is to be executed in the name of the estate owner. S. 7 of the Act provides that certain powers are to be so exercised, but only if this is practicable. Execution under a power of attorney in a mortgage appears not to come within this section at all; but the general principle of the Act is that in all cases where possible the legal estate is to be conveyed in the name of the estate owner: cf. s. 1 (7). It is, however, clearly not practicable to convey in the name of the Probate Judge (cf. *Whitehead v. Palmer*, [1908] 1 K. B. at p. 157); nor is it possible to get over the difficulty by defining the mortgagor as including the estate owner for the time being. The Act by s. 89 permits a mortgagee of leaseholds to assign the head term in his own name, presumably to avoid difficulties of this nature. It is therefore submitted that the present is clearly one of those cases where the attorney can still convey in his own name. It would be absurd to convey in the name of the mortgagor, even if the purchaser has no notice of his death; nor is he in fact the estate owner.

called the Borrower) declared that he had deposited the documents of title relating to the property hereby assured as security for and thereby charged all the property comprised therein with the payment to the Bank on demand of all moneys which then were or should from time to time be due to the Bank from the Borrower either alone or jointly with any other person or persons or company as therein mentioned including interest at any rate not exceeding (unless otherwise agreed) the Bank of England rate of discount for the time being or — per cent. per annum if the Bank rate should be below that rate to be calculated with half-yearly rests according to the usual custom of bankers although the relationship of banker and customer might have ceased AND the Borrower thereby irrevocably appointed the General Manager for the time being of the Bank to be his attorney for him in his name or otherwise to execute any deed or assurance which might be required or deemed proper on any sale of the said property under the power of sale applicable thereto in order to vest the legal estate therein in the Purchaser or purchasers

(2) There is owing to the Bank on the security of the Memo. the principal sum of £—— with the sum of £—— for interest

(3) The Borrower died intestate on the —— day of —— 19—— and no grant of representation to his estate has been made

[(4) Order under Courts (Emergency Powers) Act authorising Bank to exercise their power]

(5) The Bank in exercise of the power conferred on it by the Memo. and the Statute in that behalf has agreed with the Purchaser for the sale to him of the estate in fee simple in possession in the said property free from incumbrances for the sum of £—— and upon the treaty for the said sale it was agreed that this conveyance should be executed by the said B (who is the present General Manager of the Bank) in his own name as attorney for and on behalf of the Borrower under the hereinbefore recited Power of Attorney in the Memo.

NOW THIS DEED WITNESSETH that in pursuance of the said agreement and in consideration of the sum of £—— on or before the execution of this conveyance paid by the Purchaser to the Bank (the receipt *etc.*) the said B AS TRUSTEE by the direction of the Bank hereby conveys and the Bank AS MORTGAGEE in exercise of the power vested in the Bank by virtue of the Memo. and the Statute in that behalf and of every other power enabling it hereby releases unto the Purchaser ALL THAT *etc.* TO HOLD unto the Purchaser in fee simple free from all equity or right of redemption under and all principal money and interest secured by and all claims and demands under the Memo.

[Declaration as to value (if required).]

[Acknowledgment of right to production of documents.]

IN WITNESS *etc.* (b).

---

(b) B will execute "by power of attorney to B".

## Form 23.

**Assignment of Leaseholds by a Mortgagee who is also Administrator of the Mortgageor (a).**

Parties.

THIS ASSIGNMENT is made the — day of — 19— BETWEEN A of *etc.* (hereinafter called the Vendor) of the one part and B of *etc.* (hereinafter called the Purchaser) of the other part

Recitals:

WHEREAS :—

Lease;

(1) By a lease (hereinafter called the lease) dated *etc.* and made *etc.* ALL THAT *etc.* with the appurtenances was demised to C for the term of — years from the — day of — 19— at the yearly rent of £— and subject to the covenants on the part of the Lessee and the conditions therein mentioned.

Devolution of lease;

(2) Under and by virtue of divers mesne assignments acts in the law and events and ultimately by an assignment dated *etc.* and made *etc.* the premises comprised in the lease became absolutely vested in D for all the residue of the said term created by the lease subject to the said rents covenants and conditions

Mortgage;

(3) By a mortgage (hereinafter called the mortgage) dated *etc.* and made *etc.* the property comprised in the lease was demised by the said D to the Vendor for the residue of the said term of — years granted by the lease (except the last day thereof) by way of mortgage for securing payment to the Vendor of the sum of £— with interest thereon as therein mentioned

Death of mortgageor and letters of administration;

(4) The said D died on the — day of — 19— intestate and on the — day of — 19— letters of administration to his estate were granted to the Vendor out of the — Probate Registry

Agreement for sale;

(5) The Vendor as such administrator as aforesaid has agreed with the Purchaser for the sale and transfer to him of the premises comprised in the lease for all the residue now unexpired of the said term granted by the lease subject to the rent reserved by and the covenants and conditions in the lease contained for the sum of £—

State of debt.

(6) The said sum of £— remains owing to the Vendor on the security of the mortgage, but all interest thereon has been paid up to the date of these presents and it has been agreed that the said sum of £— shall be paid to the Vendor out of the said purchase money as such mortgagee as aforesaid in discharge of the said mortgage debt so owing to him as aforesaid

Assignment.

NOW THIS DEED WITNESSETH that in pursuance of the said agreement and in consideration of the sum of £— now paid by the Purchaser at the request of the Vendor in manner following that is to say the sum of £— part thereof to the Vendor as such mortgagee as aforesaid in full discharge of the said mortgage debt and the sum of £— residue thereof to the Vendor as such administrator as aforesaid (the receipt and payment of which sums respectively the Vendor hereby acknowledges) the Vendor AS PERSONAL REPRESENTATIVE of the said D hereby assigns and AS MORTGAGEE in respect of the mortgage term vested in him and to the intent that such mortgage

(a) If the mortgagee is willing to incur the trouble of taking out letters of administration to the estate of the mortgageor as a creditor the expense of an application to the Court for leave to exercise his powers can generally be avoided.

term may merge in the head term hereby assigns and surrenders unto the Purchaser ALL AND SINGULAR the premises comprised in the lease to HOLD the same unto the Purchaser for the residue of the said term of— years created by the lease subject to the payment of the rent thereby reserved and the performance and observance of the covenants on the part of the lessee and the conditions therein contained but discharged from all principal money and interest secured by and from all claims and demands under the mortgage.

[Declaration as to value (if required).]

[Acknowledgment of right to production of documents.]

IN WITNESS, *etc.*

Habendum

Form 24.

Conveyance of Freeholds Subject to Equitable Interests by a Mortgagee who was in Possession on September 2, 1939 (a).

THIS CONVEYANCE is made the — day of — 19— BETWEEN A of *etc.* (hereinafter called “the Vendor”) of the one part and B of *etc.* (hereinafter called “the Purchaser”) of the other part.

WHEREAS :—

(1) Under and by virtue of a compound settlement (hereinafter called “the settlement”) consisting of the documents mentioned in the Schedule hereto the property hereby assured (with other property) immediately prior to the 1st January 1926 stood limited (subject to a yearly rentcharge to C during her life charged upon and issuing out of the said property and payable quarterly without any deduction on the usual quarter days) to such uses as D should by any deed revocably or irrevocably appoint and in default of and subject to any such appointment to the use of D and his assigns during his life without impeachment of waste with divers remainders over

(2) By a principal vesting deed (hereinafter called “the vesting deed”) dated *etc.* and made *etc.* it was declared that the said property was (with other property) vested in the said D in fee simple upon the trusts declared concerning the same by the settlement and that the persons therein named were the trustees of the settlement for the purposes of the Settled Land Act 1925

(3) By a mortgage (hereinafter called “the mortgage”) dated *etc.* and made *etc.* the said D at the request of the Vendor and pursuant to section 16 of the Settled Land Act 1925 charged by way of legal mortgage the said property hereby assured (subject to the said rentcharge) with the payment to the Vendor of the sum of £— with interest thereon as therein mentioned advanced to him by the Vendor for his own use and benefit

(4) On or about the — day of — 19— the Vendor entered into possession or receipt of the rents and profits of the said property

(a) Under the Courts (Emergency Powers) Act, 1943, First Schedule, a mortgagee who was in possession of the mortgaged property, or who had appointed a receiver who was in possession at the commencement of the Act, can exercise his power of sale without the leave of the Court. The expenses of a statutory declaration that the mortgagee was in possession will fall on the purchaser: see *Re Wright and Thompson's Contract*, [1920] 1 Ch. 191. As to mortgages to secure an advance to a person having a general power of appointment over the settled land, see *Re Egerton S. E.*, [1926] Ch. 574.

Parties.

Recitals:  
settlement

vesting d

mortgage

entry int  
possessio  
appointm  
of receiv

and was in such possession or receipt at the commencement of the Courts (Emergency Powers) Act, 1939

[By a deed of appointment dated *etc.* and made between the Vendor of the one part and E of the other part the Vendor in exercise of the statutory powers in that behalf appointed the said E to be the receiver of the rents and profits of the said property and the said E was at the commencement of the Courts (Emergency Powers) Act 1939 in possession or receipt of the rents and profits thereof]

agreement  
for sale.

(5) The Vendor in exercise of the power conferred on him by the mortgage and the Statute in that behalf has agreed with the Purchaser for the sale to him of the estate in fee simple in possession in the said property subject to the said rentcharge but otherwise free from incumbrances for the sum of £——

(6) All instalments of the said rentcharge up to and including that payable on the —— day of —— last have been duly paid to the said C.

Conveyance:

NOW THIS DEED WITNESSETH that in pursuance of the said agreement and in consideration of the sum of £—— on or before the execution of these presents paid by the Purchaser to the Vendor (the receipt and payment of which sum the Vendor hereby acknowledges) the Vendor AS MORTGAGEE in exercise of the power vested in him by the mortgage and the Statute in that behalf and of every other power him enabling hereby conveys unto the Purchaser ALL THAT *etc.* TO HOLD unto the Purchaser in fee simple subject to the future payment of the said rentcharge but free from all right or equity of redemption under and all principal money and interest secured by and all claims and demands under the mortgage.

Parcels.  
Habendum

[Declaration as to value (if required).]

[Acknowledgment of right to production of documents.]

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

[This will contain particulars of the documents constituting the compound settlement.]

#### Form 25.

**Deed by a Tenant for Life under a Power in a Settlement, directing the Trustees with the Consent of a Mortgagee of his Life Estate to Raise Sums Out of Capital Money for the Education of the Infant Tenant in Tail in Remainder.**

Parties.

THIS DEED OF DIRECTION is made the —— day of —— 19—— BETWEEN A of *etc.* (hereinafter called "the Tenant for Life") of the first part B of *etc.* (hereinafter called "the Mortgagee") of the second part and C of *etc.* and D of *etc.* (hereinafter called "the Trustees") of the third part

Recitals:

WHEREAS :—

compound  
settlement;

(1) Under and by virtue of a compound settlement (hereinafter called "the settlement") consisting of the documents mentioned in the Schedule hereto and of which the Trustees are the trustees for the

purposes of the Settled Land Act 1925 and a vesting deed dated *etc.* and made between the Trustees of the one part and the Tenant for Life of the other part certain freehold properties in the county of — are now vested in the Tenant for Life and certain capital moneys are now standing in the joint names of the Trustees UPON TRUST that E shall during her life receive thereout a yearly rent-charge of £—— and subject thereto UPON TRUST for the Tenant for Life and his assigns during his life without impeachment of waste with remainder UPON TRUST that the Trustees shall receive certain capital and annual sums for and on account of portions maintenance and advancement for the younger children of F (other than any son or sons who before his or their respectively attaining the age of twenty-one years shall or any daughter or daughters who before her or their respectively attaining that age or marrying shall or would if of full age be or become indefeasibly entitled whether in possession or remainder under the settlement to the first life or entailed interest in the settled property) and subject and charged as aforesaid UPON TRUST for G (who is the eldest son of the said F and is an infant of the age of — years and is hereinafter called “the tenant in tail”) in tail male with divers remainders over

(2) Under the settlement of 19— mentioned in the said Schedule any application of capital money not authorised by the Settled Land Act 1925 or the settlement may be made by the Tenant for Life with the consent of the Trustees for the time being thereof for the purpose of the Settled Land Act 1925 (a)

power to  
raise capital  
money;

(3) No income is at present available from any source to provide for the education of the Tenant in Tail

no income  
available;

(4) The Tenant for Life is desirous that the sums hereinafter mentioned shall be raised out of capital money under the power aforesaid for the purpose of such education

desire to  
raise sum  
education;

(5) By a mortgage dated *etc.* and made between the Tenant for Life of the one part and the Mortgagee of the other part the Tenant for Life assigned to the Mortgagee his life estate under the settlement by way of mortgage for securing the payment to the Mortgagee of the sum of £—— with interest thereon as therein mentioned

mortgage  
life estate

(6) The Mortgagee being satisfied that the raising and application of such sums as aforesaid will not prejudice his security has consented to join in this deed in manner hereinafter appearing (b).

agreement  
to concur

NOW THIS DEED WITNESSETH as follows:—

1. IN pursuance of the said desire and in exercise of the aforesaid power for this purpose in the settlement the Tenant for Life hereby directs that the Trustees shall by sale or otherwise raise out of capital money for the time being subject to the trusts of the settlement such sum or sums (not exceeding in the aggregate the sum of £——) in

(a) Under s. 109 of the Settled Land Act, 1925, this power will be exercisable by the trustees for the purposes of the Act of the compound settlement. The power is an over-riding power and the consent of the jointress is not required to its exercise, at any rate if her jointure arises under the instrument containing the power or one subsequent in date: cf. *Re Mair*, [1935] Ch. 563.

(b) Probably the mortgagee will require some consideration for his concurrence, but it should be possible to give him some compensating advantage, and for this purpose the trustee's power to sanction any dealing will be useful. If necessary capital could be raised to pay him off.

each year until the tenant in tail shall attain twenty-one years or until his education shall have been completed to the satisfaction of the Trustees or until the death of the Tenant for Life whichever shall first happen as they shall in their absolute and uncontrolled discretion (but having regard to any other money from any source applicable for the same purpose) consider necessary or proper for the education of the tenant in tail together with the costs of raising such sums respectively and shall out of the gross sum so raised in each year discharge such costs and apply the balance for or towards the education of the Tenant in Tail in such manner in all respects as they shall at the like discretion deem advisable.

2. THE Trustees in exercise of the aforesaid power and the Mortgagee hereby respectively consent to the raising and application of the said sums in manner aforesaid.

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

*[This will contain particulars of the documents constituting the compound settlement.]*

## Form 26.

## Lease of a fully equipped Cinema at a rack rent (a).

THIS LEASE is made the — day of — 19— BETWEEN A. B. Ltd. whose Registered Office is at — in the County of — (hereinafter called “the Lessors” which expression where not inconsistent with the context shall include the reversioners for the time being immediately expectant on the term hereby granted) of the one part and C. D. Ltd. whose Registered Office is at — in the County of — (hereinafter called “the Lessees” which expression where not inconsistent with the context shall include their successors in title and permitted assigns) of the other part WITNESSETH that in consideration of the rents and covenants hereinafter reserved and contained and on the part of the Lessees to be paid performed and observed the Lessors hereby demise unto the Lessees ALL THAT [*here insert description of land demised and reference to plan if necessary*] TOGETHER with the Cinematograph Theatre and outbuildings and Car Park erected and laid out thereon or on some part thereof and known as the “— Cinema” (which land and buildings together with all permitted erections and additions made thereto during the term hereby granted are hereinafter called “the demised premises”) AND TOGETHER with the plant machinery apparatus furniture furnishings equipment and chattels (which together with all or any replacements or renewals thereof made by the Lessees under the provisions of clause 7 hereof are hereinafter collectively called “the said chattels”) now in upon or about the demised premises as specified in the First Schedule hereto AND TOGETHER ALSO with all rights easements privileges and appurtenances whatsoever to the demised premises appertaining or belonging EXCEPT AND RESERVING (b) unto the Lessors and their tenants

- (a) the free and uninterrupted passage and running of water soil gas and electricity from and to other buildings and land of the Lessors and their tenants adjoining adjacent or near to the demised premises by and through the gutters sewers drains watercourses pipes and wires which are now or may hereafter during the term hereby granted be in or under the demised premises the Lessors or their tenants paying a fair proportion of the expense of cleansing and keeping such gutters sewers drains watercourses pipes and wires in good repair and condition

(a) This form was drafted by Mr. L. E. Coleman. It must be adapted as necessary as many clauses which would be applicable in one instance would be inappropriate and even ludicrous in another. The question of goodwill may arise and reference should be made to note (a), *ante*, p. 262. If, as will normally be the case, the lessors or earlier tenants of the lessors have been or are running the cinema as such, the existing licences will have to be transferred and arrangements made for the assignment to the proposed lessees of the forward trade contracts and engagements including contracts for film hire. The various notes to Form 5, *ante*, p. 262, and Form 18, *ante*, p. 293, may be found of some assistance in this connection. Special arrangements will also have to be made if there are any hire or hire-purchase agreements affecting any of the equipment.

(b) Adapt exceptions and reservations as necessary.

- (b) the right of entry with or without workmen and others at all reasonable times during the term hereby granted for the purpose of inspecting renewing repairing or altering the said gutters sewers drains watercourses pipes and wires and/or of adding any others thereto
- (c) the full and free right and liberty (without obtaining any consent from or making any compensation to the Lessees) to deal as may be thought fit with any other buildings and land of the Lessors and their tenants adjoining adjacent or near to the demised premises and to erect or suffer to be erected thereon or on some part or parts thereof any building or buildings whatsoever (except a Cinematograph Theatre or other place of public entertainment or resort where the exhibition of cinematograph films forms the primary or main source of the entertainment) whether such building or buildings shall or shall not affect or diminish the light and/or air which at the date hereof or at any other time during the term hereby granted shall be enjoyed by the Lessees or other the tenant or tenants or occupier or occupiers of the demised premises

And Subject to all easements quasi easements and rights or privileges in the nature of easements appertaining or belonging to and/or enjoyed by any adjoining adjacent or neighbouring property or by the owner or owners or occupier or occupiers thereof TO HOLD the same unto the Lessees as from the — day of — 19— for a term of — years thence next ensuing Subject to but with the benefit of the documents short particulars whereof are set forth in the Second Schedule hereto YIELDING AND PAYING therefor during the said term the yearly rent of — by equal quarterly payments [in advance] on the usual quarter days in each year free from all deductions whatsoever (except landlord's property tax) the first payment or a proportionate part thereof to be made on the [execution of this Lease] [quarter day next following the date hereof] AND ALSO PAYING by way of further or additional rent from time to time (1) such sum or sums of money (if any) as the Lessors may expend or incur in effecting or maintaining the insurance of the demised premises against loss or damage by fire if the Lessees fail to comply with their covenant for insurance herein-after contained and (2) any rent to which the Lessors become entitled under section 3 (1) of the Landlord and Tenant Act 1927 by reason of the execution by them of any improvements thereunder such last-mentioned rents (if any) to be paid without any deduction on the quarterly day for the payment of the rent next ensuing after such expenditure AND the Lessees for themselves and their assigns and to the intent that the obligations hereinafter contained shall continue throughout the said term hereby covenant with the Lessors in manner following that is to say:—

1. To pay the yearly rent hereinbefore reserved and also such additional rents if any as are hereinbefore mentioned whether the same shall have been legally demanded or not on the days and in manner aforesaid without any deduction (save as aforesaid).

2. PUNCTUALLY to pay and discharge the land tax (if any) and all

rates taxes duties charges assessments dues impositions and outgoings whatsoever (c) whether parliamentary parochial local or of any other description whatsoever which are now or which may at any time or times hereafter be assessed charged or imposed on the demised premises or upon the rents thereof or on the owner or owners or occupier or occupiers in respect thereof (landlord's property tax only excepted).

3. Not to make any excavations upon any part of the demised premises or remove any sand gravel clay or earth therefrom.

4. To pay to the Lessors all costs charges and expenses (including legal costs and surveyor's fees) which may be incurred by the Lessors incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 or any statutory modification or re-enactment of that section for the time being in force notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court.

5. To do and execute all such works whatsoever as under or by virtue of any Act of Parliament (whether present or future) for the time being in force shall be directed by the local or county or other competent authority to be done or executed in respect of the demised premises whether by the landlord or by the tenant thereof and to keep the Lessors effectually indemnified from and against all actions proceedings costs charges claims demands liabilities and expenses whatsoever arising by reason of default by the Lessees in complying with this covenant.

6. To keep the said Cinematograph Theatre properly fitted up and equipped and in a state in every respect fit for the cinematograph [and stage music hall and other similar] (d) entertainment for which it is constructed or designed (subject only to the provisions of Clause 16 hereof) and in all things well and substantially to repair and keep (e) the demised premises and all walls fences gutters sewers drains watercourses pipes wires sanitary and water apparatus and other appurtenances belonging or to belong thereto by and with all needful and necessary reparations and amendments whatsoever when and as often as need or occasion shall require And particularly in a proper and workmanlike manner once in every three years of the said term and also in the last year [thereof (whether determined by effluxion of time or otherwise)] (f) to paint all the outside wood iron stucco and cement work belonging to the demised premises with two coats at least of good and proper oil colours and once in every seven years of the said term and also in the last year thereof (whether determined by effluxion of time or otherwise) to paint all the inside wood iron and plaster work belonging to the demised premises with two coats at least

(c) If the lease is to be for a comparatively short term it may be reasonable to confine the lessees' liability for rates, etc., to those of an annual or other regularly recurring nature.

(d) If the cinema has no stage or facilities for entertainment other than the exhibition of films these words should be omitted.

(e) A covenant to "keep in repair" presupposes the putting of the property into repair as well as keeping in repair.

(f) See *Dickenson v. St. Aubyn* (1943), 60 T. L. R. 59, and on appeal (1944) 60 T. L. R. 269. If preferred the expression "immediately preceding the yielding up of the demised premises" can be used here and below in lieu of the words in square brackets.

of good and proper oil colours and at the same time with every outside painting to restore and make good all defective stucco or cement work and at the same time with every inside painting to grain varnish regild whitewash stop whiten cement colour and cleanse the parts of the inside of the demised premises usually so treated and to repaper with paper of a good and suitable quality any parts thereof usually papered [AND FURTHER once in every — years of the said term thoroughly to wash down the outside stone work glazed brickwork faience work or similar type of facing material of the demised premises and once in every — years of the said term to steam clean the same] (g) And the demised premises with the said appurtenances so being in all things painted repaired cleansed maintained amended and kept as aforesaid at the end or other sooner determination of the said term peaceably and quietly to yield up unto the Lessors together with all additions and improvements made thereto in the meantime and with all fixtures and articles (additional to the said chattels) then fixed upon or belonging to the same or which shall be found thereon or belong thereto during the last — year(s) of the said term.

7. At their own expense to keep the said chattels in good and substantial repair and condition and preserved from injury and/or deterioration otherwise than by reasonable use and wear thereof and to repair replace or renew with others of equal or greater value such of the same as may become worn out or destroyed AND not to sell or permit the sale or pledge or permit the pledging of or create or permit the creation of any charge or incumbrance on any or any part or parts of the said chattels or permit any distress or execution to be levied upon or against the same and forthwith upon demand to repay to the Lessors any costs and expenses which they may incur or become liable for in instituting or defending any proceedings rendered necessary by reason of any breach of this provision AND not to permit or suffer any or any part or parts of the said chattels to be removed from the demised premises otherwise than for necessary repairs and in the latter event to take steps to see that any article or articles so removed are repaired with all possible speed and returned to their former situation or position on or in the demised premises AND during such time or times as any or any part or parts of the said chattels are temporarily removed from the demised premises under the last foregoing provision for purposes of repair to take steps to see that the same are properly insured conformably with the provisions of Clause 21 hereof and from time to time to give to the Insurance Company concerned such notice or notices as may be requisite to comply with this provision and punctually to pay such extra or additional premium or premiums (if any) as may be demanded AND at the end or other sooner determination of the said term and simultaneously with the delivery up of the demised premises conformably with the provisions of the last foregoing clause hereof peaceably and quietly to deliver and yield up unto the Lessors the said chattels so kept repaired preserved replaced or renewed as aforesaid.

8. To permit the Lessors and their surveyor or surveyors agent or agents with workmen or others once or oftener in every year of the

said term to enter upon the demised premises (but not so as to interfere in any manner whatsoever and either directly or indirectly with any public private or other performance or performances or rehearsal or rehearsals in the said Cinematograph Theatre or the normal and usual business thereof) to inspect the state of repair and condition thereof and of the said chattels and also for the purpose of executing any improvements to the demised premises which the Lessors may undertake to execute and of making any inspection of the demised premises which may reasonably be required for the purposes of Part I of the Landlord and Tenant Act 1927 and within the last — year(s) to take a schedule of fixtures and articles thereupon (additional to the said chattels) and if any defects (either of the demised premises and/or of the said chattels) shall at any time be found upon any such inspection to give to the Lessees or leave upon the demised premises notice in writing to repair and amend replace or renew the same within three calendar months from the date thereof within which period the Lessees shall repair and amend replace or renew the same accordingly PROVIDED that if such notice be not complied with within three calendar months the Lessors may without prejudice to the right of re-entry hereinafter contained carry out the repairs amendments replacements and/or renewals referred to therein and recover the cost thereof (together with any surveyor's fees incurred) on demand from the Lessees as liquidated damages.

9. To permit the Lessors and their surveyor or surveyors agent or agents with workmen or others to enter upon the demised premises as often as need or occasion shall require (but not so as to interfere in any manner whatsoever and either directly or indirectly with any public private or other performance or performances or rehearsal or rehearsals in the said Cinematograph Theatre or the normal and usual business thereof) for the purpose of executing any repairs or alterations to the adjoining adjacent or neighbouring premises of the Lessors the Lessors making good at their own expense all damage caused to the demised premises by the exercise of this right.

10. To contribute a reasonable proportion of the expense of making repairing and cleansing all party and fence walls gutters sewers drains watercourses pipes wires and other articles and things used or to be used by the Lessees or tenants or occupiers of the demised premises in common with the occupiers of any adjoining adjacent or neighbouring premises such proportion in case of dispute to be settled by the Lessors' surveyor whose decision shall be final and binding.

11. Nor without the previous consent in writing of the Lessors (the same not to be unreasonably withheld) to make or permit to be made any structural or other alteration or addition in or to the demised premises or any part thereof (other than an improvement which the Lessees may be entitled to make on the demised premises in pursuance of the powers in that respect contained in Part I of the Landlord and Tenant Act 1927 and in manner thereby authorised) unless such structural or other alteration or addition is required by the licensing or other competent authority in which event the Lessees shall be at liberty to carry out and execute the necessary works forthwith (h) and

(h) It is advisable to put the lessees in such a position that they can comply immediately with any requirements of the licensing authority.

without reference to the Lessors but shall as soon as practicable after the completion of the works furnish the Lessors free of all cost with details thereof together with a copy of any relevant plan or drawing.

12. IN the event of executing any such improvement as aforesaid to pay to the Lessors such a sum of money in respect of any damage to or diminution in the value of the demised premises or any neighbouring premises belonging to the Lessors which may be occasioned by the execution of any such improvement and also in respect of any legal or other expenses (including the fees of the Lessors' surveyor) in connection with the grant of any licence or consent to execute any such improvement or otherwise as in default of agreement to the contrary may be determined by arbitration in manner hereinafter provided.

13. NOT to do or permit or suffer anything to be done in upon or about the demised premises which may be an act of waste or spoil or which shall or may be or grow to the annoyance nuisance disturbance grievance or damage of the Lessors or their tenants or the inhabitants in the neighbourhood.

14. NOT at any time during the said term to permit any encroachment by any adjoining owners or other persons in under or upon the demised premises or any part thereof or interference with the boundaries of the demised premises or the acquisition by any adjoining owners or other persons of any right of light or air or any other right easement quasi easement or right or privilege in the nature of an easement of any kind whatsoever and forthwith to give notice in writing to the Landlord of any attempt or attempts on the part of any person or persons to encroach on the demised premises and/or to acquire any such right of light or air as aforesaid and to permit the Lessors to enter the demised premises and to take all such steps and to do all such acts and things as may to the Lessors seem necessary or desirable to protect their estate and interest in the demised premises (i).

15. To carry on the said Cinematograph Theatre in a proper orderly and businesslike manner and conformably with the terms and conditions of the existing or any future licences granted in respect thereof and in strict accordance with the requirements of the — County Council and/or any other authority now or hereafter having power to make regulations in regard to the management and conduct of cinemas and/or music halls in the County of — and also in strict accordance with (i) the provisions of the Cinematograph Act 1909 the Sunday Entertainments Act 1932 (if applicable) and Section 12 of the Children and Young Persons Act 1933 (j) or any Act or Acts extending amending or re-enacting the same or any of them and all regulations made under any such Acts or any of them and for the time being in force and (ii) all or any relevant new Act or Acts which may

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(i) This clause should be adapted as necessary. Sometimes the onus of taking the actual steps necessary for preventing the acquisition of the easement or stopping the encroachment is placed on the lessees with a proviso, in default, for the lessors to do what is necessary at the lessees' expense and to recover on demand any costs incurred. Alternatively, where the lessors are liable as in this form and they deem it necessary or advisable to institute any proceedings it is not unusual for the lessees to have an indemnity against any costs they may incur if they are joined.

(j) Adapt as necessary. There may be local statutes, and if a theatre licence is held the Theatres Act, 1843, will apply.

during the said term come into operation and all regulations made thereunder and for the time being in force and to do nothing to endanger any licences necessary to the proper carrying on thereof and punctually to make or cause to be made any necessary applications for renewal of and use their best endeavours to obtain all such licences from time to time (subject only to the provisions of the next following clause hereof) and on the expiration or sooner determination of the said term (subject as aforesaid) to take at the expense of the Lessors all or any necessary steps to secure a transfer of such licence or licences as may then be in force to the Lessors or as they may direct.

16. So long as the necessary licences can be obtained to use the demised premises for the purpose of high-class cinematograph exhibitions [and stage or music hall performances] and not without the previous consent in writing of the Lessors (which shall not be unreasonably withheld in the event of renewal of the said licences being refused for reasons not (either directly or indirectly) attributable to the default of the Lessees) to use permit or suffer the demised premises or any part thereof to be used for any other purpose.

17. Not at any time to cause or permit business to be suspended and/or the said Cinematograph Theatre or any part thereof to be closed down for a period exceeding — consecutive weeks in any one year (*k*) unless such suspension or closing down is required by Government decree or order made or issued during the present or any future emergency and then for so long only as such decree or order is in force PROVIDED HOWEVER that the Lessees shall be at liberty to suspend business and/or close down the said Cinematograph Theatre or any part thereof if there shall be a fire or serious accident on the demised premises or any part thereof or in the event of a strike lock-out or other industrial dispute directly affecting the business of Cinematograph Exhibitors generally or for the purpose of such redecorations alterations or additions to the demised premises as the licensing or other competent authority shall require or as the Lessees shall consider desirable or be under obligation to carry out to enable them duly to comply with their or any of their obligations hereunder but in the event of the demised premises being closed for any of the aforesaid purposes then the necessary works (if any) shall be carried out with all diligence and the demised premises shall be re-opened to the public and business resumed with all possible speed AND in the event of any dispute touching this provision the decision of the Lessors or their surveyor shall be binding on the Lessees.

18. Not to assign transfer underlet or part with possession of the demised premises or any part or parts thereof without the previous consent in writing of the Lessors such consent not however to be unreasonably withheld in the case of a respectable and responsible assignee or sub-tenant and in the event of a sub-letting provided the same is at a fair rack rental and no premium is taken.

19. WITHIN one month after any assignment transfer underlease disposition or devolution of the demised premises or any part or parts

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(*k*) If it is decided that there is no goodwill worth consideration this clause will be unnecessary unless the lessors have some special reason for desiring it.

thereof to give notice in writing of such assignment transfer underlease disposition or devolution to the solicitors for the time being of the Lessors and to produce to them the instrument of such assignment transfer underlease disposition or devolution and pay to them a fee of One Pound One Shilling (l).

20. Not to affix or exhibit or permit or suffer to be affixed or exhibited without the previous consent in writing of the Lessors any electric or other signs bills hoardings notice boards placards or advertisements on the exterior of any part of the demised premises except in such spaces as may be approved for such purposes by the Lessors (such approval not to be unreasonably withheld [and not to be deemed necessary in respect of the Neon lighting and Halo sign which form part of the design of the said Cinematograph Theatre] ) (m) which spaces shall be used exclusively for exhibiting electric or other signs stills posters notices and other like matters directly appertaining to the films and stage music hall or other entertainment to be exhibited in or appear at the said Cinematograph Theatre.

21. To insure and keep insured the demised premises and the said chattels against loss or damage by fire in the full value thereof and also the boilers in the demised premises against explosion all such insurances to be in the joint names of the Lessors and the Lessees [and (in the case of the insurances of the demised premises and boilers) in the names of any other interested parties] in the office of the — Insurance Co. Ltd. or in such other office as the Lessors shall from time to time direct and to produce to the Lessors on request the policy or policies of such insurance and the receipt or receipts for the last premium or premiums which have become due in respect thereof AND if and whenever the demised premises or any part thereof and/or the said chattels or any or any part or parts thereof shall be destroyed or damaged by fire or there shall be an explosion of the said boilers forthwith to apply all moneys received in respect of such insurances in or towards reinstating replacing and/or renewing the same under the direction and to the satisfaction of the Lessors' surveyor (whose fees shall be paid by the Lessees) and in case such money shall be insufficient for that purpose out of their own moneys to make good the deficiency

PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED that if such insurances shall not be effected and maintained by the Lessees as aforesaid it shall be lawful for but not obligatory upon the Lessors to effect and maintain or (as the case may be) to keep up such insurances and to pay every such premium or other sum as may be necessary and to recover all moneys expended by them for that purpose as and by way of additional rent as hereinbefore provided.

22. To permit the Lessors during the — calendar months

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(l) In view of the preceding prohibition against alienation except with consent it may not be thought necessary to have this registration covenant.

(m) Adapt as necessary with a suitable description of any exterior Neon lighting or omit if there is none. It should not be overlooked that at the present time the Neon lighting (if any) will have been out of use for some years and considerable expense may have to be incurred in putting it into working order again. If the lessors are to bear or contribute to this expense the lessors' covenants in this lease should be amplified or a suitable undertaking or cash payment obtained.

immediately preceding the determination of the said term to affix upon any part of the demised premises (but not in such a position as to cause unnecessary or unreasonable inconvenience to the Lessees or to interfere with the normal and usual carrying on by them of the said Cinematograph Theatre) a notice for reletting or selling the same and during the said period to permit intending tenants and/or purchasers at reasonable times of the day (but not during any public private or other performance or performances or rehearsal or rehearsals in the said Cinematograph Theatre) and with the written authority of the Lessors or their Agents to view the demised premises and the said chattels.

23. DULY to pay satisfy discharge fulfil perform observe and carry out all the liabilities covenants and obligations of the Lessor's subsisting at the date hereof in relation to and/or contained in the documents referred to in the Second Schedule hereto and on the part of the Lessors to be paid satisfied discharged fulfilled performed observed and carried out and at all times hereafter to keep the Lessors effectually indemnified from and against all actions proceedings costs charges claims demands and expenses whatsoever in respect of any breach of such liabilities covenants and obligations arising after the date of this Lease.

PROVIDED ALWAYS AND IT IS HEREBY EXPRESSLY AGREED AS follows :—

(i) If the rent hereby reserved or any part thereof shall be unpaid for 21 days after any of the quarter days aforesaid (whether such rent shall have been legally or formally demanded or not) or if the Lessees shall at any time fail or neglect to perform or observe any of the covenants conditions or agreements on the part of the Lessees herein contained or if the Lessees being a company shall have a receiver appointed or shall go into liquidation whether voluntary or compulsory (except for the purpose of amalgamation or reconstruction or for the sale of the Lessees' undertaking) or being an individual shall become bankrupt or make an assignment for the benefit of or an agreement or arrangement with his or her creditors for liquidation of his or her debts by composition or otherwise or suffer any distress or process of execution to be levied upon his or her goods or property then and in any such case it shall be lawful for the Lessors or any person or persons duly authorised by them in that behalf into and upon the demised premises or any part thereof in the name of the whole to re-enter and the same to have again repossess and enjoy as in their first and former estate anything herein contained to the contrary notwithstanding and thereupon the term hereby created shall cease without prejudice to any right of action or remedy of the Lessors in respect of any antecedent breach of any of the covenants by the Lessees hereinbefore contained.

(ii) In case any instalment of the said rent shall not be paid on the day hereinbefore appointed for payment thereof or within 21 days next after such day (whether such rent shall have been legally or formally demanded or not) then and in such case and whenever the same shall happen it shall be lawful for the Lessors (in lieu of making such entry as last aforesaid) by writing under the hand of their secretary to appoint either the treasurer or money-taker for the time being employed upon the said Cinematograph Theatre or such

other person as the Lessors shall think proper to act as receiver and to receive the entrance money and all other moneys receivable in the said Cinematograph Theatre until the rent then for the time being payable to the Lessors or which shall become payable in the meantime while the person so appointed shall be acting as such receiver shall have been paid or satisfied as hereinbefore provided and the Lessees will do all things necessary to enable the person so appointed as receiver and his or her agents and servants to receive all such moneys as aforesaid without any interruption or molestation and will not after receiving notice of the appointment of a receiver until such receiver shall have been paid and satisfied the said arrears of rent in manner aforesaid receive or permit any person to receive any such moneys except with the sanction and as the agent of such receiver and the moneys which shall be received by any such receiver shall be applied in manner following (that is to say): In the first place in payment of such amount as the Lessors shall direct not exceeding Five Pounds per centum upon the amount of such moneys in respect of the salary of such receiver and in the next place in payment of the costs and expenses incurred by the Lessors in and about the appointment of such receiver and in the next place in payment of the salaries and wages of the persons employed and other necessary costs incurred in the production of the cinematograph and stage music hall or other entertainment and in the next place in payment to the Lessors of such moneys as then shall remain due and owing to the Lessors in respect of the said rent and the surplus (if any) of such moneys shall then be paid to the Lessees PROVIDED always that notwithstanding the appointment of any such receiver the aforesaid right of re-entry shall remain exercisable by the Lessors in the same events and in the same manner as is hereinbefore provided in that behalf.

(iii) If the Lessees shall be desirous of determining this present Lease at the expiration of the — or — year thereof and of such their desire shall give to the Lessors not less than six calendar months previous notice in writing [and shall up to the date of such determination pay the rent or rents hereby reserved and perform and observe all the covenants on their part hereinbefore contained] then on the expiry of such — or — year (as the case may be) this present Lease and everything herein contained shall cease and be void but without prejudice to the rights and remedies of either party against the other in respect of any antecedent claim or breach of covenant.

(iv) If the Lessees shall be desirous of taking a new Lease of the demised premises and the said chattels on the expiration of this present Lease and of such their desire shall give previous notice in writing to the Lessors not less than six calendar months before the expiration of the said term then the Lessors will at or before the expiration of the said term and provided there shall then be no subsisting breach of any of the Lessees' covenants and obligations under this present Lease at the cost of the Lessees grant to the Lessees a new Lease of the demised premises and the said chattels for a further term of — years (n) to

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(n) Although the point is unlikely to arise in connection with a lease of this nature it should be borne in mind that clause 7 (2) of the 15th Schedule of the Law of Property Act, 1922, precludes the making of a contract for renewal of a lease for a term exceeding sixty years from the termination of such lease.

commence from the expiration of the said term at the [same rent] [rent of — pounds per annum] and with and subject to the same covenants and conditions as in this present Lease reserved and contained this present covenant for renewal excepted.

(v) In case any dispute or difference whatsoever shall arise between the parties hereto with respect to anything herein contained or the operation or construction thereof or the rights duties or liabilities of either party under this Lease or otherwise in connection with the demised premises and/or the said chattels (including any matter which under the Landlord and Tenant Act 1927 would otherwise be determined by the tribunal instituted under that Act) then and in every such case the matter in question shall be referred to two arbitrators one to be appointed by each party or their umpire in accordance with and subject to the provisions of the Arbitration Acts 1889 to 1934 or any statutory modification or re-enactment thereof for the time being in force or in case either party shall neglect or refuse to appoint an arbitrator within one month after being requested in writing by the other party so to do then by a single arbitrator to be appointed by the President for the time being of the Chartered Surveyors Institution upon the request of such other party.

(vi) Section 196 of the Law of Property Act 1925 shall apply to all notices requiring to be served hereunder

AND the Lessors hereby covenant with the Lessees (a) that the Lessees duly paying the said rents and performing and observing the covenants conditions and agreements on their part to be performed and observed shall and may hold and enjoy the demised premises for the term aforesaid without lawful eviction or interruption by the Lessors or any persons rightfully claiming under them [or by title paramount] and (b) that the Lessors will not during the said term either themselves or through any subsidiary or associated Company or jointly with or as agents for any person firm or Company carry on or be (either directly or indirectly) in any way engaged concerned or interested in the business of Cinematograph Theatre proprietors within a radius of — miles from the demised premises and that no other property now or hereafter belonging to them within the said radius shall during the said term be used as a Cinematograph Theatre or for any other place of public entertainment or resort where the exhibition of cinematograph films forms the primary or main source of the entertainment (o).

IN WITNESS *etc.*

THE FIRST SCHEDULE ABOVE REFERRED TO :—

[Here a detailed list of the furniture furnishings and equipment of the cinema should be set out. It is preferable to put too much detail rather than the reverse so as to avoid disputes when the Lease expires. Special care should be given to all loose plant and equipment.]

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(o) See note (k), *ante*. If there is no goodwill to consider this clause will be unnecessary.

## THE SECOND SCHEDULE ABOVE REFERRED TO :—

| <i>Date</i> | <i>Description</i> | <i>Parties</i> | <i>Subject-matter</i> |
|-------------|--------------------|----------------|-----------------------|
|-------------|--------------------|----------------|-----------------------|

[Here insert particulars of any matters subject to which the grant will be made: *e.g.*, Canopy Agreements, Light and Air Agreements, Agreements creating easements enjoyed with the cinema, Wayleaves, Licences granted by the Local Authority to have and maintain works for the benefit of the cinema, etc.]



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